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The role of legal frameworks in enabling transparency in water utilities' regulation

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Mohamad Mova Al'Afghani

2013

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**THE ROLE OF LEGAL FRAMEWORKS IN ENABLING
TRANSPARENCY IN WATER UTILITIES' REGULATION**

by

Mohamad Mova Al'Afghani

A thesis submitted in partial fulfilment of the requirements for the degree of

Doctor of Philosophy

University of Dundee

2012

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Phnom Penh, June 30 2012

Mohamad Mova Al'Afghani

ABBREVIATIONS

AASB: Australian Accounting Standards Board

Bapepam LK: Badan Pengawas Pasar Modal dan Lembaga Keuangan (Indonesia). *Capital Market and Financial Institution Supervisory Agency*

BPP-SPAM: Badan Pendukung Pengembangan Sistem Penyediaan Air Minum (Indonesia). *Drinking Water Provision System Developing Agency*

CA 2006: Companies Act 2006 (UK)

CC Water: Consumer Council for Water (UK)

Col: Conflict of Interest

CPS: Contract Publishing System (Victoria)

DEFRA: Department of the Environment and Rural Affairs (England)

DSE: Department of Sustainability and the Environment (Victoria)

DWI: Drinking Water Inspectorate (England)

EA: Environmental Agency (England)

EIR: Environmental Information Regulation (England)

ESC: Essential Services Commission (Victoria)

EWOV: Energy and Water Ombudsman Victoria

Fol: Freedom of Information

FRD12A: Financial Reporting Directive 12 A (Victoria)

GMS: General Meeting of Shareholders

GR-16: Indonesia's Peraturan Pemerintah 16 Tahun 2005 (*Government Regulation 16 Year 2005*)

IC: Information Commission

KIP: Komisi Informasi Pusat (*Indonesia's Central Information Commisison*)

MALE: Maximum Access, Limited Exemption

NRA: National Rivers Authority (England, now defunct and merged into EA)

OFWAT: Water Services Regulatory Authority (England)

PSAK: Pernyataan Standar Akuntansi Keuangan (*Indonesia's Accounting Standards*)

PSP: Private Sector Participation

RAC: Regulatory Accounting Code (Victoria)

RAG: Regulatory Accounting Guideline (England)

VCAT: Victoria Civil and Administrative Tribunal

VGPB: Victoria Government Procurement Board

WIA 1991: Water Industry Act 1991 (England)

WIA 1994: Water Industry Act 1994 (Victoria)

WSL: Water Supply Licence

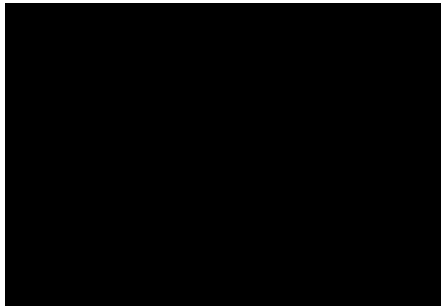
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I, the candidate, hereby declare that this thesis is my own work and has not been submitted for any other higher degree. All references cited have been consulted unless otherwise stated and a list of references provided.

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SIGNED STATEMENT BY SUPERVISOR

I, the supervisor, hereby acknowledge that the conditions of the relevant Ordinance and Regulations have been fulfilled.

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SUMMARY

This thesis evaluates transparency in the context of water utilities' regulation by comparing legal frameworks in three jurisdictions: Victoria (Australia), England (United Kingdom) and Jakarta (Indonesia). Each of these jurisdictions is selected because of their particular ownership and regulatory model. The thesis analyses whether specific ownership or regulatory models will have implications for transparency.

The terms “transparency” and “water utilities’ regulation” are first defined and form the thesis’ analytical framework. This is then applied against the three jurisdictions compared. By evaluating each of the three jurisdictions, the thesis expects to provide explanation on how transparency is enabled or inhibited by the legal frameworks. The thesis recommends a solution by comparing the three jurisdictions and generating “lessons learned”.

1. INTRODUCTION

1.1. Problematique

1.1.1. Governance Failure

The Global Water Partnership stated in 2000 that the water crisis is mainly a crisis of governance.¹ The Camdessus report acknowledged that the root of the problem in water services is due to the lack of governance². Transparency, as well as participation and accountability, have been identified as the key to good governance.³ The 2008 Global Corruption Report which focuses on the water sector attributed the lack of transparency as the driver of corruption.⁴

One of the principles for effective water governance is that it should be open and transparent, in that language should be accessible and understandable and all policy decisions, particularly with regard to financial transactions, should be

¹ Global Water Partnership, *Towards water security : a framework for action* (Global Water Partnership ; World Water Forum 2000)

² Winpenny, J. and Camdessus, M., *Financing water for all: Report of the world panel on financing water infrastructure* (Global Water Partnership, World Water Council, World Water Forum 2003)

³ Godbole, M., *Public accountability and transparency : the imperatives of good governance* (Orient Longman 2003) See also in general Quesada, M.G., *Water and Sanitation Services in Europe: Do Legal Frameworks provide for "Good Governance"?* (UNESCO Centre for Water Law Policy and Science at the University of Dundee 2010) <<http://goo.gl/g2zN6>> accessed January 3, 2012 and Hendry, S.M., 'An Analytical Framework for Reform of National Water Law' (PhD thesis, University of Dundee 2008)

⁴ Zinnbauer, D. and Dobson, R. (eds), *Global Corruption Report 2008: Corruption in the Water Sector* (Cambridge University Press; Transparency International 2008) Corruption in the drinking water and sanitation sector in developing countries raises connection cost by 30%, inflating MDG cost by more than 48 billion dollars p. xxiv also Klitgaard, R., 'Strategies against corruption' (Presentation at Agencia Española de Cooperación Internacional Foro Iberoamericano sobre el Combate a la Corrupción, Santa Cruz de la Sierra, June, 15-16 1998) ; Rose-Ackerman, S., 'Corruption and government' 15 International Peacekeeping 328

transparent.⁵ Transparency has been defined as “*a process by which information about existing conditions, decisions and actions is made accessible, visible and understandable*”.⁶ According to Allan and Rogers, transparency and accountability “*are built on the free flow of Information*”.⁷ The Preamble of the Aarhus Convention states transparency as one of its purposes and this is established by enabling ‘access to information’.⁸

Lack of transparency is a concern for water services around the world: Budapest⁹, Johannesburg¹⁰, Jakarta¹¹, Malaysia¹², China¹³ and the Czech Republic¹⁴. In the UK, even with its advanced regulatory system, the House of Commons Select Committee on Environmental Audit still deemed that OFWAT is still unable “*to*

⁵ Rogers, P. and Hall, A., *Effective water governance (TEC background papers no. 7)* (Global Water Partnership, Stockholm 2003)

⁶ International Monetary Fund, ‘International Monetary Fund Reports on the International Financial Architecture by the G22 Working Group on Transparency and Accountability, Working Group on Strengthening Financial Systems and Working Group on International Financial Crises (Group of 22)’ <<http://www.imf.org/external/np/g22/index.htm>> accessed May 28, 2009

⁷ Rogers and Hall, *Effective water governance (TEC background papers no. 7)*

⁸ See the Preamble of Aarhus Convention. Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 25 June 1998 (Aarhus Convention) 38 International Legal Materials (ILM) (1999) 515

⁹ Lobina, E., ‘Problems with Private Water Concessions: A Review of Experiences and Analysis of Dynamics’ in Asit K. Biswas and Cecilia Tortajada (eds), *Water pricing and public-private partnership* (Routledge 2005)

¹⁰ McKinley, D., ‘Water is life: the anti-privatisation forum and the struggle against water privatisation’ Public Citizen

¹¹ Interview with Dr. Riant Nugroho at the Jakarta Water Regulatory Body, April 20th 2009. See also Estache, A. and Kouassi, E., ‘Sector organization, governance, and the inefficiency of African water utilities’ World

¹² ‘Watchdog: Why is water deal under OSA? - Malaysiakini’ <<http://www.malaysiakini.com/news/62323>> accessed November 02 2009

¹³ Ge, Y. (2008). “Rethinking China’s Urban Water Privatization.”

¹⁴ Skapová, H., *Water industry privatisation in the Czech Republic: money down the drain?* (Transparency International - Czech Republic 2009)

struck the right balance between commercial confidentiality and operational transparency".¹⁵ A research by the Interfaith Center on Corporate Responsibility (ICCR) which represents over 100 billion USD in invested capital concludes that disclosure by water utilities on environmental, social and governance information is 'murky'.¹⁶ It warned investors to be cautious and, in the absence of a mandatory disclosure requirement, to take extra care to compel the companies to disclose more.¹⁷

Private sector participation (PSP) is often associated with the decrease of transparency. According to Swyngendouw this is caused by the commodification of information that was formerly in the public domain.¹⁸ In turn, this limits access to data and information required by social groups. However, commodification may not be the only reason why information is held. In some cases, confidentiality is also used as a pretext by governmental agencies as a shield against political embarrassment.¹⁹ The (supposed) lack of transparency in PSP is often used to demonstrate the advantages of state ownership by its proponents: "*The potential for transparency is an essential advantage of public utilities over privatised water delivery*", because in privatised water delivery "*key information is defined as out of reach due to reasons of*

¹⁵ 'House of Commons - Environmental Audit - Seventh Report' <<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmenvaud/597/59703.htm>> accessed November 02, 2009

¹⁶ Lowe, L.H., Jones, P. and Brown, R., *Liquid Assets. Responsible Investment in Water Services* (2009) <http://www.iccr.org/news/press_releases/pdf%20files/LIQUIDASSETS-Final_sec.pdf> accessed 20 November 2011

¹⁷ Ibid

¹⁸ Swyngendouw, E., 'Dispossessing H₂O: the contested terrain of water privatization' 16 *Capitalism Nature Socialism* 81

¹⁹ Zifcak, S., 'Contractualism, democracy and ethics' 60 *Australian Journal of Public Administration* 86

commercial confidentiality” .²⁰ Whether or not publicly owned utilities are free from confidentiality claims and whether secrecy is prevalent in privatised utilities will be tested in this thesis.

In line with the criticism that PSP reduces transparency, Mulgan considered that companies often abused their right to secrecy using contracts they entered into with government. He thus suggested that private companies engaged in public services should expect more intrusion compared to those in normal dealings.²¹

Lobina and Hall explained that one of the failures of public private partnership in the water sector is the failure of knowledge transfer from the multinational corporations to the local partner. The multinationals will only be keen to transfer a limited degree of technical knowledge which does not endanger their superior position with their local partner. According to them “*commercial operations invariably prefer confidentiality and secrecy, as it protects their ability to manage financial affairs to maximise the benefit to their owners*”.²² Furthermore, they argued that private actors will have control over who has access to the text of concessions.²³ It is understandable that companies have an interest in managerial knowledge and control over operation as they are self interested entities operating for profit. Companies will withhold any information as long as doing so maximises their benefit.

²⁰ Brennan, B. and others, *Reclaiming Public Water!: Participatory Alternatives to Privatization* (Transnational institute (TNI) 2004) p.270

²¹ Mulgan, R., ‘Contracting Out and Accountability’ 56 *Australian Journal of Public Administration* 106

²² Lobina, E. and Hall, D., ‘The comparative advantage of the public sector in the development of urban water supply’ 8 *Progress in Development Studies* 85

²³ *Ibid*

1.1.2. Transparency and Economic Regulation

The natural monopolistic character of the water supply sector makes it not feasible for direct competition to work. Regulation came to supplant the absence of competition with the hope of correcting market failure.²⁴ Transparency is one of the tools to enable economic regulation.

In economic terms, the relationship between regulators and utilities is often conceptualised in a “principal-agent relation”²⁵, in which a problem then occurs when a party *hires* another party to perform some activities in their interest. In a water utilities context, the principal-agent problem can be found in several parts, between the regulator and utilities (regulator as principal and utilities as agent) and between the regulator and legislator/public in general (regulator as agent legislator/public as principal). In each situation, there is a problem of information asymmetry where the agent has more information about the job they are doing than the principal. The utilities always have more knowledge of their actual cost structure than the regulators. Meanwhile, the regulators always have more knowledge of the regulated utilities compared to the legislators. As agents always have more informational advantage than

²⁴ Jouravlev, A. and United Nations. Economic Commission for Latin America and the Caribbean, *Water utility regulation : issues and options for Latin America and the Caribbean* (Economic Commission for Latin America and the Caribbean 2000) See also Hantke-Domas, M.P., ‘Economic Regulation of Public Utilities with Natural Monopoly Features. A Study of Limitations Imposed by Property Rights from a Legal & Economic Approach’ (Dissertation, University East Anglia 2005) and Hendry, ‘An Analytical Framework for Reform of National Water Law’

²⁵ On the inaccuracy and possible danger of using the principal agent analogy to regulation, see Prosser, T., ‘Regulatory contracts and stakeholder regulation’ 76 *Annals of Public and Cooperative Economics* 35. Prosser views regulation as a network in which there is no single dominant objective (e.g. only protecting consumer or in allowing investment return). This section is not meant to reinforce the conceptualisation on monolithic regulatory objective, but only in describing the cases where an “information asymmetry” problem may occur.

its principal, it always has the incentive to cheat in order to maximise its own welfare. What needs to be done in this case is to make information available to the principal(s),²⁶ in this case the regulators and the public.

There are some ways to reduce information asymmetry between regulators and utilities, namely, by facilitating competition, applying incentive regulation and conducting information gathering.²⁷ Even if the last two options are feasible, there is no way to avoid information asymmetry as, irrespective of any method used, the regulator will always be required to audit the company.²⁸ Hence, information gathering will always be a substantial part of the regulation process.²⁹

Information gathering is costly, it requires a certain amount of regulatory capacity to decipher the information and the decision resulting from this process is susceptible to capture. One way of avoiding potential capture is by providing the result of information gathering to the public. The public, in spite of their diverse interest and lower per capita gain in intervening in the regulatory process, can potentially consists of a pool of different parties, from academics, practitioners,

²⁶ The idea of multiple principle-agent relationships is discussed by Laffont and Tirole Laffont, J.J. and Tirole, J., *A theory of incentives in procurement and regulation* (MIT press 1993)

²⁷ Burns, P. and Estache, A., 'Infrastructure concessions, information flows, and regulatory risk' 203 Public Policy for the Private Sector

²⁸ Facilitating competition may not be feasible in large parts of water services, due to economics of scope and scale. Applying incentive regulation may, in theory, reveal information on the regulated industry. However, in practice, each type of regulation, whether in the form of rate of return or price cap, for example, has its own basic informational need which requires direct auditing. In rate of return, the base rate needs to be determined and the determination of base rate requires inquiry into historical company performance. In price cap, the efficiency factor (X or K in the water sector) is very vulnerable to capture.

²⁹ Green, R. and Pardina, M.R., *Resetting price controls for privatized utilities: a manual for regulators* (World Bank Publications 1999)

industry (including competitors or potential entrants), potential investors (shareholders or creditors) to customers; each have an interest in information regarding the utility. The public can form alliances (for example, between consumer organisations and competitors) and combine their knowledge to scrutinise the information and the regulatory process. Disclosure would bring these benefits: (i) aiding the regulator in deciphering information derived from the utility, (ii) proposing alternative policy based on the information, (iii) creating incentive for the firm to improve accounting quality (iv) preventing collusion and corruption between the regulator and the utility and (v) developing the industry by sharing best practices and know-how and, therefore, lowering the barrier to entry.³⁰ Not all information submitted by utilities to the regulator is available for public disclosure as it may be restricted by sectoral regulation or an obligation of confidence not to disclose it to the public.

The position discussed in this section, which suggests that transparency can aid the regulatory process, is only one of several justifications for transparency. Previously, section 1.1.1 has elaborated that transparency is required for governance purposes such as in mitigating corruption. This is the descriptive rationale for transparency. Sections 2.1, 2.5, 3.2, 3.3 and 3.4 will contain some discussion regarding the normative justifications for transparency, among others, for enforcing the human right to water or as a prerequisite for democratic regulation. Both the descriptive and normative justifications on transparency entail that transparency is the

³⁰ See Boehm, F. and Olaya, J., 'Corruption in public contracting auctions: the role of transparency in bidding processes' 77 *Annals of Public and Cooperative Economics* 431 Boehm, F., 'Regulatory capture revisited – Is there an anti-corruption agenda in regulation?' Boehm, F., *Regulatory Capture Revisited—Lessons from Economics of Corruption* (Internet Centre for Corruption Research (ICRG) Working Paper 2007) Boehm, F., *Anti-Corruption Strategies as Safeguard for Public Service Sector Reforms* (2007)

default position and that non-disclosure shall be perceived as an exception. This means that non-disclosure is permitted to the extent that it is legitimate. The burden of proof is placed on the parties refusing to disclose.

1.1.3. Appeals to Legal Frameworks on Disclosure

Various reports appeal to legal frameworks on disclosure, such as the Freedom of Information law, in order to ensure transparency in water services. Transparency International in its 2008 Global Corruption Report (GCR 2008) stresses that ‘strong’ Freedom of Information laws “*provide the foundation for transparency in the water sector*”.³¹ The GCR 2008 also recommends that states “*adopt and implement transparency and participation as guiding principles for all water governance*”.³²

Supporters of PSP also rely on transparency. The *Padco Report*, facilitated by USAID to attract private investment, depends on the Freedom of Information (FoI) law, sunshine rules and capital market regulation, primarily citing the US experience.³³ Authors such as Graham and Prosser contrasted the US condition with the UK, where not even a minimal sunshine rule was discussed.³⁴ Many other

³¹ Zinnbauer and Dobson, *Global Corruption Report 2008: Corruption in the Water Sector* p.117 (conclusion)

³² *ibid* see “Recommendation 4”, p.xxviii

³³ PadCo, ‘A Review of Reports by Private-Sector-Participation Skeptics, Prepared for Municipal Infrastructure Investment Unit (MIU), South Africa and The United States Agency for International Development (USAID), Contract No. 674-0312-C-00-8023-0’ (February 2002) <<http://www.psiru.org/others/PadcoSkeptics.doc>> accessed November 02, 2009 See also Hall, D., ‘Secret Reports and Public Concerns. A Reply to the USAID Paper on Water Privatisation ‘Skeptics’ Londres: Public Services International Research Unit (PSIRU)

³⁴ Graham, C. and Prosser, T., *Privatizing public enterprises: constitutions, the state, and regulation in comparative perspective* (Oxford University Press, USA 1991)

commentators acclaimed the US model of regulation with its sunshine laws³⁵ and rules on *ex parte* contacts.³⁶ A survey of 39 regulators worldwide conducted by NERA Economic Consulting for the World Bank recommends that governments legislate a legal framework for regulatory transparency, either at a national or regional level.³⁷ These appeals for disclosure or transparency frameworks have a basis in economic regulation theories, which suggest that publication of accounts will give an incentive to regulators to improve their accounting capacity and fosters the firm to establish credibility.³⁸ Disclosure is regarded as an anti-capture,³⁹ anti-corruption strategy and a prerequisite for participation.⁴⁰

1.2. Title and Research Question

The title of this thesis is “The Role of Legal Frameworks in Enabling Transparency in Water Utilities’ Regulation” and the research question that it attempts to answer is “How can Legal Frameworks Enable Transparency in Water Utilities’ Regulation?” The thesis intends to explore how legal frameworks would enable transparency in water utilities regulation and, in doing so, help to tackle the

³⁵ Palast, G., Oppenheim, J. and MacGregor, T., *Democracy and regulation: how the public can govern essential services* (Pluto Pr 2003)

³⁶ Olson, W.P., ‘Secrecy and Utility Regulation’ 18 *The Electricity Journal* 48

³⁷ Hern, R. and others, *Regulatory Transparency: International Assessment and Emerging Lessons A Final Report for the World Bank* (NERA Economic Consulting, 2005)

³⁸ Laffont, J.J., *Regulation and development* (Cambridge University Press 2005)

³⁹ Boehm, F., *Anti-corruption strategies as safeguard for public service sector reforms* (2007) <[http://www.wiwi.uni-](http://www.wiwi.uni-passau.de/fileadmin/dokumente/lehrstuehle/lambsdorff/Economics_of_Corruption_2007/Boehm_-_Anti-Corruption_as_Safeguard_for_Public_Sector_Reforms.pdf)

[passau.de/fileadmin/dokumente/lehrstuehle/lambsdorff/Economics_of_Corruption_2007/Boehm_-_Anti-Corruption_as_Safeguard_for_Public_Sector_Reforms.pdf](http://www.wiwi.uni-passau.de/fileadmin/dokumente/lehrstuehle/lambsdorff/Economics_of_Corruption_2007/Boehm_-_Anti-Corruption_as_Safeguard_for_Public_Sector_Reforms.pdf)> Accessed, January 5, 2012

⁴⁰ Page, B. and Bakker, K., ‘Water governance and water users in a privatised water industry: participation in policy-making and in water services provision: a case study of England and Wales’ 3 *International Journal of Water* 38

governance crisis in the water sector. The thesis rests on the hypothesis that ‘lessons learned’ on transparency can be generated by comparing legal frameworks in water utilities’ regulation in three different jurisdictions: Victoria, England and Jakarta, each with a different modus of ownership and regulation.

1.3. Methodology

The methodology applied to this dissertation is analytical and comparative. This chapter (Chapter 1) outlines the problematique of ‘water utilities’ regulation in the form of a lack of transparency and corruption and subsequently sets the research question. Chapter 2 explores existing literature to identify the “research gap”, defines the concept of “transparency” used in the title and the research question, presents a rationale and theoretical foundations for regulation and provides a framework within which transparency could be enabled. Chapters 3, 4 and 5, respectively Victoria, England and Jakarta (see section 1.5. below for the justifications in selecting these case studies) are case study chapters where the analytical framework generated in chapter 2 is applied. Chapter 7 presents a side by side comparison of the items compared in the previous chapters. These lessons learned, along with the concluding chapter (chapter 8), are expected to be able to provide an answer to the research question and contribute to solving the problematique explained in chapter 1.

Comparative methodology needs to pay specific attention to gaps between law in books and law in action and to tackle the gap in publicly available information.⁴¹ There are often large gaps between laws in books and how it is actually practiced in Indonesia and not all the laws are published. Thus, an interview is required for chapter

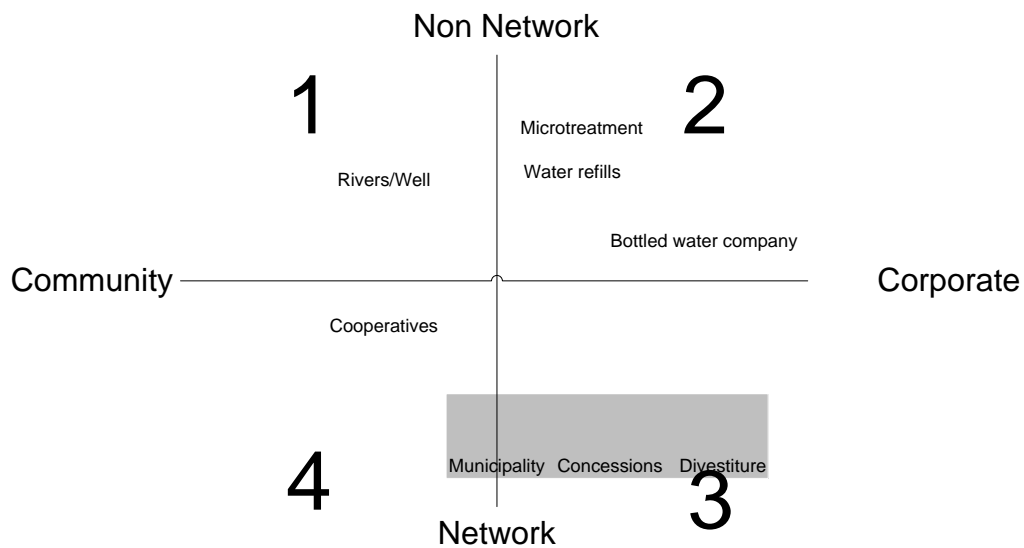
⁴¹ Reitz, J.C., ‘How to do comparative law’ 46 American Journal of Comparative Law 617

6 (Jakarta) in order to supplement the desk legal analysis. Such interview is deemed not required for other jurisdictions compared in this thesis.

1.4. Scope

1.4.1. Water Services

Figure 1 Types of Water Services (adapted from Bakker)⁴²



⁴² Bakker, K., 'Archipelagos and networks: urbanization and water privatization in the South' [Blackwell Publishing Ltd] 169 *Geographical Journal* 328

In countries where there is no full coverage of water utilities, the term “water services” comprises of both networked and non-networked means of providing water for drinking and sanitation purposes.⁴³ Some populations in many developing countries rely on their water for drinking and sanitation by abstracting it directly from natural sources, i.e. surface and groundwater.

The situation where water is abstracted directly from natural sources without any attachment to a network is depicted on the first quadrant of Figure 1. In this instance, the governance problem is very much related to the management of water resources: the framework of allocation among competing users and the issue of environmental water quality. On the second quadrant lies the category of those who abstract and treat water through more sophisticated means, albeit still unattached from the network. In this category there are small scale water providers, microtreatment facilities, water refilling companies and bottled water companies. The governance issues with small scale water providers (SSWPs) are related to its pricing, availability and monitoring or the problem of monopoly of access to hydrants in situations where SSWPs are acting as the complement to a networked utility. Meanwhile, water refilling companies and bottled water companies promise potable water service. Governance issues with these companies are primarily with respect to their monitoring. Water refilling companies and bottled water companies need to be constantly monitored by health agencies so that they meet their promise in providing potable water and adverse health effects can be avoided.

⁴³ Government Regulation No. 16 Year 2005 on Drinking Water Provision System Art. 5

The third and fourth quadrants depict networked water utilities. The fourth quadrant of Fig.1 comprises cooperatives, community owned or non-corporatised networked water utilities belonging to a government department. Their services are prevalent in housing complexes, small villages or apartment and offices buildings. Meanwhile, the third quadrant depicts networked water utilities in a corporate legal entity. The more a water utility leans to the right side, the more ‘corporatised’ it becomes.

The focus of this thesis is the governance of water utilities existing in the lower end of the Y axis (highly networked) and spans across the spectrum between the fourth and third and along the third quadrant. Thus, to the extent that the water utility is highly networked and an independent legal entity having separate and distinguishable assets and liabilities, it falls under the analytical framework, irrespective of whether it is public or private. In this category lies publicly owned water utilities established through state owned enterprise laws, concessions or unincorporated joint ventures between a publicly owned water utility or government with purely private entities, and the ‘full divestiture’ form of water utilities incorporated under general company law.

What differentiates the governance problem between these water utilities and other types of water services is their networked character which results in a natural monopoly situation: the economics of scale and scope, a high barrier of entry and a high ‘exit’ cost for consumers, triggering the need to establish an independent regulatory body. It is also the reason why the term used in this thesis is “Water Utilities’ Regulation” and not “Water Services’ Regulation”. The term “water services” is a much broader concept than “water utilities”.

1.4.2. Economic Regulation

There are differences of opinion on what may constitute ‘economic regulation’. However, it is generally agreed that economic regulation is related to the tariff setting and the management of service standards. According to the World Bank, economic regulation consists of “*the rules and organizations that set, monitor, enforce, and change the allowed tariffs and service standards for water providers*”.⁴⁴ The monitoring of compliance with drinking water quality or effluent discharge (as a part of service specification) and customer service issue is regarded as a part of economic regulation as they are a part of the natural monopoly problem.⁴⁵ On the other hand, health issues arising out of drinking water quality and environmental issues from effluent discharge are considered to be outside of economic regulation. Also considered outside economic regulation are cross subsidy regimes, the protection of vulnerable groups and network extension to unserved areas. Nevertheless, the World Bank noted that the borderline is not always clear.⁴⁶ In the next section below we will discuss the broader view on regulation.

How economic regulation can be enabled depends on the ‘regulatory model’. On the one hand, there is “regulation by independent agency”, in which the functions above are prescribed by law and practised through the discretion of the independent regulator. On the other hand, there is “regulation by contract” in which contracts, instead of an independent agency, are used to manage the above contingencies. The distinction between the two is often debated as the two are probably only a part of a

⁴⁴ Groom, E., Halpern, J. and Ehrhardt, D., ‘Explanatory Notes on Key Topics in the Regulation of Water and Sanitation Services’ 6 Water Sector Board Discussion Paper Series

⁴⁵ Ibid

⁴⁶ Ibid

wider spectrum of regulation.⁴⁷ The middle ground between the two traditions in which contracts are still used but a regulator is installed to deal with some of the regulatory features is called a “hybrid” model.⁴⁸

1.4.3. Water Utilities’ Regulation

For public lawyers, the notion of ‘regulation’ is much broader than depicted by the World Bank in the previous section. This is due to the fact that all kinds of regulation must have been grounded on the constitution, where values such as equality, transparency and accountability are guaranteed. Thus, for public lawyers, regulations are not constrained to a specific ‘efficiency’ objective, but also have social, environmental and rights-based rationales.

Hendry, for example, considered that a legal framework of water services will comprise of the following framework: (1) The structure, ownership and control (of water utilities); (2) The duties of supply – this relates to the problem of disconnection, constitutional guarantee of the right to water as well as its implementation of sectoral water rules; (3) Standards of Water Supply and Treatment; (4) Economic Regulation and Business Planning; (5) Customer Protection and Service Standard; and (6) Water

⁴⁷ Some models are regulation by government, regulation by independent agency, regulation by contract and regulatory outsourcing (expert panels). See Eberhard, A., ‘Infrastructure regulation in developing countries: an exploration of hybrid and transitional models’ (African Forum of Utility Regulators, 3rd Annual Conference, 15-16 March 2006, Windhoek, Namibia) <http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/publication/AFUR_hybrid_and_transitional_models_ebhart_paper_0.pdf> accessed on February 6, 2012

⁴⁸ Ibid

Conservation.⁴⁹ This depicts that water services' regulation has all the economic, environmental and social objectives.

However, this thesis will not specifically focus on the transparency of the environmental aspects of water utilities' regulation because they are highly intertwined with the regulation of water resources and general environmental laws. The environmental transparency of water utilities' regulation would require its own in depth investigation.

1.5. Justifications for case studies

1.5.1. Experience with Freedom of Information Law in England and Victoria

The United Kingdom enacted the Freedom of Information Act in 2000⁵⁰ and the Environmental Information Regulations in 2004. The number of requests made under English FoI per year is around 120,000. The FoI costs in 2005 were 35.5m GBP.⁵¹

Being a country well known for “privatising” its essential services, the UK experience is important in understanding how the FoI regimes can adapt and respond to such challenges. It is intriguing to explore whether access to information laws are

⁴⁹ Hendry, 'An Analytical Framework for Reform of National Water Law' Chapter 5

⁵⁰ Freedom of Information Act 2000, 2000 c.36

⁵¹ 'Freedom of information: Every expense spared | The Economist' (Dec 19th 2006) <http://www.economist.com/world/britain/displaystory.cfm?story_id=E1_RQVJSQ&source=login_payBarrier> accessed November 20 2009

applicable to the privatised⁵² water utilities and, if they are, how the exemption clauses will operate.

Victoria has the oldest FoI Law compared to England and Indonesia, valid since 1982.⁵³ The interpretation and development of the Victorian FoI experience has also been influenced by FoI reforms at Commonwealth level as well as in other Australian jurisdictions. The Victorian FoI Act has been revised several times to reflect the demands of its age, including the advent of outsourcing.⁵⁴

While the UK FoI is interesting from the point of view of how access to information regimes adapt to the problem of divestiture, the Victorian FoI is interesting in terms of its adaptation to contracting out. As the literature review section will elaborate, contracting out of government service has been criticised for reducing accountability and transparency. However, due to limitations in finances and expertise, it is often inevitable for the public sector to engage with the private sector. In this circumstance, the expectation for transparency lies with the FoI regime. It is thus relevant to investigate how FoI regimes have been reformed and applied to such conditions.

1.5.2. Recent implementation of Freedom of Information Law in Indonesia

⁵² The term “privatisation” is ambiguous, nevertheless, it is used widely in the literature as demonstrated in section 2.1.1. The thesis will use “Private Sector Participation” in order to describe a privatisation in terms of ownership models. This will be dealt in section 2.1.2

⁵³ Freedom of Information Act 1982 No. 9859 of 1982

⁵⁴ Snell, R., ‘Freedom of Information: The Experience of the Australian States-An Epiphany?’ 29 Federal Law Review 343

Indonesia enacted the Freedom of Information Law in 2008⁵⁵ and it took effect in 2010. The FoI institution has just been set up and made operational, but still lacks experience in dealing with FoI disputes. Compared to the UK FoIs, the number of exemptions on Indonesia's FoI is lower and the exemption clauses are more narrowly construed.

In terms of applicability, unlike the UK FoIs, the Indonesian FoI provides a definition of public authorities. This covers state owned companies. However, since some water utilities are 'privatised' (by way of concession) there is a low chance that the FoI can be applicable directly to them.

The Indonesian FoI provided some minimum duty of publication to public authorities and this covers regulators. However, the duty to publish is only for a limited extent of the public authorities' finances and performance. The Public Service Law mandates public authorities to publish key terms of contracts with private parties and also some performance aspects of the contract.⁵⁶

1.5.3. Advanced water services regulation in England

Water services in England has been undergoing reforms ever since it was "privatised". The Water Industry Act 1991⁵⁷ has been amended several times.⁵⁸ The most interesting feature of the English water services law is the creation of an

⁵⁵ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik

⁵⁶ Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik

⁵⁷ Water Industry Act 1991 c.56

⁵⁸ The latest amendment at the time of writing is the Water Industry (Financial Assistance) Act 2012 c.8

independent body of an economic regulator, OFWAT. OFWAT is given a lengthy mandate under the acts mentioned above, and this covers the power of enforcement and adjudication.

The initial intent for “privatising” the water sector – with the RPI-K formula – is to provide ease of regulation. The yardstick competition was expected to provide light touch regulation. However, what followed afterwards was a tremendous restructuring of the water industry accompanied by the creation of complex institutions. Competition appeared to be difficult to implement and as such regulation seemed to be perpetual, not a matter of “holding the fort” until competitive forces arrived. Furthermore, the light touch of regulation in the water services sector has not been proven as OFWAT is still required to rigorously collect information from the utilities, although this might change in the future. This information gathering exercise contributes significantly to the cost of regulation. In 2003-2004, OFWAT’s annual budget was around 12.5 million pounds which represents around 50 pence on each water bill.⁵⁹

Considerable price increases followed the divestiture with the gains transferred to companies and shareholders.⁶⁰ Meanwhile, there was a growing risk of social disparity given the companies’ power to disconnect those who cannot afford to pay. When the WIA 1991 was amended in 1999, the law prohibited disconnection to

⁵⁹ Ballance, T. and Taylor, A., *Competition and economic regulation in water : the future of the European water industry* (IWA Publishing 2005)

⁶⁰ Bakker, K., ‘Paying for water: water charging and equity in England and Wales’ 26 *Transactions of the Institute of British Geographers* 143

private dwellings for the reason of non-payment.⁶¹ This marks the acknowledgment that regulation of water services cannot be constrained to a purely economic agenda as there are social issues as well.

The UK experience shows that the privatisation of water utilities is not an easy task, as it can only be materialised through adequate regulatory capacity which includes expertise and supply of budget and it must also be supported by a good system of governance.

1.5.4. Experience with public ownership and contracting out in Victoria

In contrast to England, Victoria's water utilities are state owned monopolies. Comparing different ownership models is relevant for the study, because lack of transparency is often perceived as the result of privatisation.⁶²

The regulatory structure is arguably simpler than England's, as is the role of the institutions. The Essential Services Commission (ESC) is a multi utility regulator tasked with regulating not only water, but also energy and ports, among others. The Victorian water sector is segregated into several different companies on the bulkwater

⁶¹ Water Industry Act 1991 (England) Schedule 4A

⁶² For example, Hall, D. and Lobina, E., 'Private to Public: International lessons of water remunicipalisation in Grenoble, France' (American Water Resources Association, Dundee, 6-8 August 2001) Psiru, 'Undermining Democracy and the Environment, PSI Briefing, The Hague World Water Forum' <

www.psiru.org/reports/2000-03-W-Htrans.doc > accessed December 25, 2011 Swyngedouw, 'Dispossessing H₂O: the contested terrain of water privatization' Minow, M., 'Public and private partnerships: accounting for the new religion' Harvard Law Review 1229

supply and retail side, all of which are publicly owned and economically regulated by the ESC.

Furthermore, even when utilities are state owned, there is usually a part of the service which is delivered through Private Sector Participation (PSP). In Victoria, this occurs at the bulkwater supply side where the state owned bulkwater supply company Melbourne Water entered into a concession contract with Aquasure, a private company. Jakarta's water utilities (both the bulkwater supply and the retail companies) are also publicly owned. PSP is also found in the Jakarta case study, but this is conducted at treatment and distribution level. Notwithstanding these differences, the thesis will compare the transparency of the contractual arrangements between Victoria and Jakarta.

The rise of contracting out of government services in Australia in general has sparked interest from public lawyers on its impact on transparency and accountability. As will be discussed in the literature review section, many of the leading authorities on the transparency and accountability impacts of contracting out have come from Australian public lawyers. Victorian experiences in dealing with contracting out may therefore contribute to the similar situation in Indonesia.

1.5.5. Hybrid 'British-French' model of water privatisation with independent regulator in Jakarta and public ownership in other regions

The Indonesian Constitution mandated that "*branches of production which are vital for the State and which affect the life of most people are controlled by the State*"

and this has been interpreted to extend into water utilities.⁶³ However, in practice, shares of state owned water utilities can be partially sold to investors and concession contracts between water utilities and private parties are allowed. Only full divestiture is not allowed.

The condition of the water utilities is already bleak. Around 220 water utilities hold more than 400 outstanding loans to the central government and 63% of these are in default, with the total amount of debt amounting to 500 million USD.⁶⁴ The provision for water supply financing is estimated (optimistically) to be at 50 million USD per year, whereas in order to reach the MDG target, it is required to be at the level of 450 millionUSD, nearly ten fold of the estimated amount.⁶⁵

Responding to this situation, there are three scenarios that are envisaged. The first is that the healthy water utilities (which comprise of only around 5% of existing utilities) will remain under state ownership. Secondly, institutionalised PPP, or the joint ownership of utilities between municipal government and investors is sought. The third is the current model of concession as applied in Jakarta, the country's capital, where a regulator is installed.

The concession model that applies in Jakarta follows the "French model" of water privatisation but the French system does not have any independent body tasked

⁶³ Judicial Review of the Law No. 7 of 2004 on Water Resources, Constitutional Court of the Republic of Indonesia, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004.

⁶⁴ Ibid.

⁶⁵ *Alternative Financing For Water Utilities in Indonesia: A Review of Lessons and Challenges* (Report by Development Alternatives, Inc for review by the United States Agency for International Development under Contract No 497-M-00-05-00005-00, 2008)

with the economic regulation of water services. Instead, some part of the regulatory function is dealt with by the French Administrative Court with the Conseil d'Etat at the top.⁶⁶

The Indonesian (Jakarta) version of concession also depends on contracts which were signed between the municipal government, the regional (state owned) utilities and the private entities. The Jakarta concession mandates for the creation of an independent regulator tasked with supervising the private concessionaires, adjudicating disputes among the private concessionaire and the state owned water utility, and advising the Governor on charges. The Governor reinforces this mandate in a gubernatorial decision. Similar to its counterparts in England and Victoria, the Jakarta regulator requires information from the utility and has the obligation to disclose some information for transparency purposes.

In addition, water utilities in other regions which are ailing might also be privatised by selling parts of their shares to the private sector through institutionalised PPP construction. As this construction also involves a long term and complicated contract (for example, through the shareholders' resolution), it is also conceivable to install an independent regulator. Similar to the regulator in a concession model, the regulator of an institutionalized PPP will also require information and the publication of such information to the public. The future of Indonesian water regulation thus may resemble that of England and Victoria, in terms of an independent regulatory body tasked with economic regulation.

⁶⁶ For a complete account on the French system see Shugart, C.T., 'Regulation-by-Contract and Municipal Services: The Problem of Contractual Incompleteness' (Ph.D Thesis Harvard University 1998) especially p.35

1.5.6. Other Jurisdictions

The author is aware that there are other jurisdictions which would make interesting case studies to be compared with one another. The French model of water services provision is said to be the origin of the expanding trend towards regulation by contract in the water sector.⁶⁷ Why not compare France? As briefly explained above, France is particularly unique due to the position of its administrative court as a quasi super regulator in managing contracts. This is a particular feature that makes the so called “French Model” work in its country of origin. Such a feature is not enjoyed by many other countries, such as Indonesia. Most countries utilise an independent regulatory body to manage the relationship between the government and the private sector and these have also been implemented to supervise government owned utilities.

The Dutch water sector is also particularly interesting because it implements “sunshine rules” for its water utilities.⁶⁸ However, private sector participation is prohibited by law, and as such it would be impossible to assess the loss of transparency due to the delegation to the private sector.

Furthermore, one of the aspects that this thesis attempts to explain is transparency of the decision making process in independent regulatory bodies. With

⁶⁷ See Finger, M. and Allouche, J., *Water privatisation: trans-national corporations and the re-regulation of the water industry* (Taylor & Francis 2002)

⁶⁸ De DeWitte, K., ‘On Analyzing Drinking Water Monopolies by Robust Non-Parametric Efficiency Estimations’ (PhD, University of Leuven 2009) Saal, D. and De Witte, K., ‘Is a little sunshine all we need? On the impact of sunshine regulation on profits, productivity and prices in the Dutch drinking water sector’ 20 *Journal of Regulatory Economics* 61

the absence of such bodies in the French and Dutch water sectors, it would be impossible to draw comparison.

1.6. Chapter Conclusion

This chapter has provided an outline of the problematique and research question posed by this thesis, the methodology used, scope and justifications for selecting the case studies. The next chapter will discuss existing literature relevant to the thesis and clarify several theories and concepts which lead to the formation of the analytical framework.

2. THEORETICAL FRAMEWORK

This chapter will first discuss existing literature on public service, privatisation and its impact on transparency and identify the research gap. It will then attempt to clarify the concepts and theories used throughout this thesis.

2.1. Literature Review

There is literature focusing on the transparency aspects of delegated public services to the private sectors. Although some of the literature does not concern water utilities, it remains relevant because water utilities' regulation will often involve some form of delegation of essential services to the private sector, the degrees of which are different from one jurisdiction to another.

The wave of “privatisation” and contracting out had provoked an intense debate about a new kind of accountability for the private sector. Minow warned that “*access of information about services and results will decrease if the information becomes private*”.⁶⁹ This goes along with Swyngedouw's argument as quoted earlier that “privatisation” of some parts of the water cycle “*diminishes the transparency of decision making procedures and limits access to data and information*” that could permit stakeholders to base their views, option and decisions.⁷⁰

Some commentators consider that “regulation by contract” has particular transparency problems. This is argued by Lobina and Hall who suggest that it is “*the*

⁶⁹ Minow, ‘Public and private partnerships: accounting for the new religion’

⁷⁰ Swyngedouw, ‘Dispossessing H 2 O: the contested terrain of water privatization’

private operator [which has] control over who can access the text of the concession agreement and tariff formulae".⁷¹ Rouse also criticised "regulation by contract":

*"What it [regulation by contract] doesn't do is provide any means of regulating the contract owner, nor does it provide for transparency and public participation. On the contrary, it tends to reduce transparency and assumes that governments can look after the consumers' interests. Also, this lack of transparency risks providing the conditions for corruption."*⁷²

Similar criticism is voiced by Eberhard:

"Transparency is also often compromised in regulatory contracts, such as concession agreements or power purchase agreements. Few of these contracts are open to public scrutiny. Government officials and private operators often justify such secrecy on the grounds of "commercial necessity or competition". But it is unclear why the secrecy is needed if the operator has been granted a de facto or de jure monopoly that eliminates any possibility of competition, at least for a significant number of years".⁷³

⁷¹ Lobina and Hall, 'The comparative advantage of the public sector in the development of urban water supply'

⁷² Rouse, M., *Institutional governance and regulation of water services*, vol 2 (2007) p.26-27

⁷³ Eberhard, 'Infrastructure regulation in developing countries: an exploration of hybrid and transitional models'

Meanwhile, Prosser⁷⁴ had warned against viewing regulatory relationships as “essentially contractual”: “*the concept of an overall regulatory contract fits badly with the openness to changing democratic goals and principles.*”.

One must bear in mind that the claims that “privatisation” decreases transparency are not without contenders. Proponents of private sector participation such as Payen et al⁷⁵ and Marin⁷⁶ oppose the idea that “privatisations” are not transparent. Payen et al⁷⁷ and Marin⁷⁸ contend that licences or PPP contracts always spell out in great detail the private sector’s performance targets and also contain some form of mandatory reporting to their public counterpart. Often such mechanism provides for better transparency than unregulated public sector. Can it be that both the proponents and opponents of PSPs are correct and the problem is merely of their definition and idea of transparency? Transparency can have various meanings and dimensions. Hendry, for example, associates ‘transparency’ in the context of water

⁷⁴ Prosser, ‘Regulatory contracts and stakeholder regulation’

⁷⁵ Payen, G., Moss, J. and Waeyenberge, T.V., *Private Water Operators Contribute to making the Right to Water & Sanitation real, AquaFed’s submission, Part 3 Avoiding misconceptions on private water operators in relation to the Right to Water and Sanitation* (AquaFed 2010) <http://www.aquafed.org/pdf/2010%20CDA_RTWS_Aquafed5.pdf> also Payen, G., *UN Human Rights Council Public hearing by the Independent Expert on the Right to Water, Introductory remarks by Gerard Payen* (AquaFed 2010) <http://www.aquafed.org/pdf/RTWSGeneva_CDA_PublicHearing_GPspeech_finalb_Pc_2010-01-27.pdf>

⁷⁶ Marin, P., *Public-private partnerships for urban water utilities: a review of experiences in developing countries* (World Bank Publications 2009)

⁷⁷ Payen, Moss and Waeyenberge, *Private Water Operators Contribute to making the Right to Water & Sanitation real, AquaFed’s submission, Part 3 Avoiding misconceptions on private water operators in relation to the Right to Water and Sanitation* see para 6.2 also Payen, *UN Human Rights Council Public hearing by the Independent Expert on the Right to Water, Introductory remarks by Gerard Payen* para 2

⁷⁸ Marin, *Public-private partnerships for urban water utilities: a review of experiences in developing countries* p.131

utilities' regulation with the revelation of not only cost structure or finances⁷⁹ but also access to information.⁸⁰ Thus, there can be situations where the cost structure is well defined but the public has no access of information.

A large body of literature on the topic of transparency and privatisation topic comes from Australia. Mulgan, for example, came up with the conclusion that public sector accountability is generally more stringent, despite the fact that the power of the private sector is growing to match that of the state.⁸¹ He stated that the degree of disclosure and the level of scrutiny in the private sector is less than is required of ministers in parliaments.⁸² Freiberg, focusing on accountability issues on the contracting out of prisons, argues that contractual arrangements between government and correctional agencies must be open, as it is a matter of "public interest".⁸³ Meanwhile, Sands opined that a commercial confidentiality clause in Public Private Partnership contracts "*effectively limits citizen access to publicly owned information, thereby jeopardizing the chance of informed public debate and healthy public accountability outcome.*"⁸⁴

⁷⁹ Hendry, 'An Analytical Framework for Reform of National Water Law' Transparency is associated with billing (p.345), cost recovery (p.352), accounting (p.387), comparative information or benchmarking (p.410), tariffs (p.292)

⁸⁰ Ibid p.430

⁸¹ Mulgan, R., 'Comparing accountability in the public and private sectors' 59 Australian Journal of Public Administration 87

⁸² Ibid

⁸³ Freiberg, A., 'Commercial Confidentiality, Criminal Justice and the Public Interest' 9 Current Issues in Criminal Justice 125; for similar concern in England, see Shaw, S., 'Prisons: Who Gains from Commercial Confidentiality?' [Routledge] 13 Public Money & Management 7

⁸⁴ Sands, V., 'Right to Know and Obligation to Provide: Public Private Partnerships, Public Knowledge, Public Accountability, Public Disenfranchisement and Prisons Cases, The' 29 University of New South Wales Law Journal 334

In Australia, the concern over the decreasing transparency due to contracting out is not only a matter of academic debate, but also a political one. In 2000, the Victorian Parliament launched an inquiry into commercially confidential material and its intersection with the public interest.⁸⁵ The inquiry concluded that the blanket exception to disclosure granted to trade secrets under the Victorian Freedom of Information Act is unnecessarily wide⁸⁶ and recommended that there should be a reversal of burden of proof which would require the private party arguing for non-disclosure to substantiate that disclosure would be harmful to its commercial interests.⁸⁷ However, how public interest should be defined and how the weighing of trade-offs should be carried out remains unsolved.

The other genre of literature comes from the ‘economic regulation’ discipline. This literature has a rather different approach in explaining transparency in the regulatory setting. Their focus is on reducing the asymmetry of information and thereby enhancing efficiency. For them, “efficiency” is a central concept and the purpose of transparency. Transparency is relevant if it enhances the quality of regulation or if it promotes competition. Transparency which is not compatible with the efficiency objective is considered a cost.

⁸⁵ Victorian Parliament Public Accounts and Estimates Committee, *Inquiry into commercial in confidence material and the public interest : thirty-fifth report to Parliament* (2000)

⁸⁶ Ibid p.117

⁸⁷ Ibid p.137

Laffont⁸⁸ briefly mentioned in his book that disclosure of information by the regulator on cost structure provides an incentive for utilities to act honestly and improve their accounting quality. Boehm,⁸⁹ using capture theory and the economics of corruption, argued to overcome ‘the myth of business secrecy’ in order to enhance information flow between regulator and utility. The reason for this is twofold: first, in order to enhance regulatory capacity by aiding the regulator in deciphering information from the utility (through stakeholder participation) and second, to prevent collusion between the two by increasing the cost of concealment through transparency. Boehm is attempting to justify his first argument, enhancing regulatory capacity, by developing a potential capture by consumer interest which focuses on the alliance between stakeholders groups⁹⁰ in the regulatory process, with an aim to match the utility’s dominance. Also argued by Klein,⁹¹ the consumer can, in Boehm’s perspective, influence the decision making process by submitting alternative interpretations of information to the regulator. The second justification in Boehm’s theory came from the capture theory developed by Laffont and Tirole. According to them, a regulator who has more time and resources to find the true nature of the firm has more information compared to the principal, the legislator.⁹² The regulator, in collusion with the utility, can have an incentive by hiding information from the

⁸⁸ “*Making cost information public may be a way for the regulator to improve the quality of accounting by fostering more truthful disclosure of information by establishing its credibility for honest behavior.*”

See Laffont and Tirole, *A theory of incentives in procurement and regulation*

⁸⁹ Boehm, *Anti-corruption strategies as safeguard for public service sector reforms*

⁹⁰ See Becker, G.S., ‘A theory of competition among pressure groups for political influence’ *The Quarterly Journal of Economics* 371

⁹¹ Klein, M.U., *Economic Regulation of Water Companies* (World Bank, Private Sector Development Dept. 1996) Klein advocates to use rival and interest groups to generate information

⁹² Laffont, J.J. and Tirole, J., ‘The politics of government decision-making: A theory of regulatory capture’ *The Quarterly Journal of Economics* 1089

legislator, if it is beneficial to the utility. As mentioned by Boehm,⁹³ capture can occur through the “revolving door”, conference travel or industry-favourable academic research. In their theoretical model, Laffont and Tirole demonstrate that capture reduces social welfare.⁹⁴

It is important to note that the “public lawyer” approaches have different motivation and values to promote than the “economic regulation” school and this may influence how transparency should be implemented in practice, especially if there is no direct justification of economic benefit. Aronson argued that the public lawyer concept of “public interest” is wider than only correcting market failure or granting cross subsidy.⁹⁵ For them, public interest involves other values such as fairness, consistency, rationality, participation, legality, accountability and accessibility of judicial and administrative grievance procedures. Aronson further rejected the trade-off between transparency and commercial confidentiality and argued for the expansion (rather than contraction) of the governmental notion of transparency when it involves privatisation and contracting with private actors.⁹⁶

The debates over regulation, however, had incorporated more political rationales of regulatory objectives which would go along with Aronson’s arguments above. Prosser argued that the objectives of regulation are not constrained into the maximisation of economic efficiency – although such remain important – but also

⁹³ Boehm, *Anti-corruption strategies as safeguard for public service sector reforms*

⁹⁴ Laffont and Tirole, *A theory of incentives in procurement and regulation*

⁹⁵ Aronson, M., ‘A Public Lawyer’s Response to Privatization and Outsourcing ’ in Michael Taggart (ed), *The Province of Administrative Law* (Oxford, UK: Hart Publishing 1997)

⁹⁶ Ibid

have more rights-based and egalitarian justifications.⁹⁷ Such a position has been widely acknowledged in recent regulatory debates as reflected in the works of Majone,⁹⁸ Graham⁹⁹ or Lodge and Stirton,¹⁰⁰ for example. This shift towards non economic arguments means that transparency in utility regulation should be fostered not only because of the economic rationale, but also because there are underlying equity and democratic justifications. Nevertheless, when there is a conflict between efficiency values versus ‘public law’ values, the resolution is not always clear cut.

Another strain of the debate focuses on the issue of natural monopoly and confidentiality. Authors such as Palast, Oppenheim and MacGregor¹⁰¹ considered that commercial secrecy is an oxymoron, especially in cases where firms do not have competitors, such as in some segments of the electricity industry.¹⁰² A similar position is advocated by Simpson¹⁰³ who argues that “*in a natural monopoly there is no justification for commercial confidentiality during the life of a contract*”. Eberhard (quoted above) also considers that a de facto or de jure monopoly granted to operators should render it difficult for them to justify secrecy.¹⁰⁴ Meanwhile, whilst not rejecting confidentiality in its entirety, the UK’s Department of Trade and Industry suggests that information provided by monopoly businesses to the regulator

⁹⁷ Prosser, T., *Law and the Regulators* (Oxford University Press, USA 1997) p. 31

⁹⁸ Majone, G., ‘The regulatory state and its legitimacy problems’ 22 *West European Politics* 1

⁹⁹ Graham, C., *Regulating public utilities : a constitutional approach* (Hart 2000)

¹⁰⁰ Lodge, M. and Stirton, L., ‘Regulating in the Interest of the Citizen: Towards a Single Model of Regulatory Transparency’ 50 *Social and economic studies* 103

¹⁰¹ Palast, Oppenheim and MacGregor, *Democracy and regulation: how the public can govern essential services*

¹⁰² Ibid

¹⁰³ Simpson, R., ‘Down and dirty: providing water for the world’ 14 *Consumer Policy Review* 146

¹⁰⁴ Eberhard, ‘Infrastructure regulation in developing countries: an exploration of hybrid and transitional models’

should “generally be disclosable” whereas for markets emerging into competition, the extent of disclosure required is related to the degree to of the company’s market power.¹⁰⁵

There are gaps which have not been adequately addressed through the above research. First, there is a lack of a coherent, holistic approach on transparency research with a focus on water utilities’ regulation. This requires a clear definition and understanding of what “transparency” actually means. Most of the literature does not clarify what it means by transparency (or the lack thereof) and this eventually leads to an incoherent debate. It also tends to focus only on some particular aspect of water utilities’ regulation, mostly on the contracting parts, therefore, eclipsing the more complex “big picture” of the water sector. The literature gap can only be addressed by, firstly, providing a clear definition of transparency and reconciling the above research with more comprehensive work on water utilities’ regulation.¹⁰⁶ Only then can a more coherent understanding of transparency in the context of water utilities’ regulation be achieved. Second, there are hypotheses in the literature which need to be tested through case studies. The hypotheses are: (a) that confidentiality in a natural monopoly context is oxymoronic or unjustified, (b) that privatisation (or the delegation of) some or all of the parts of the water services cycle diminishes transparency, and (c) that regulation by contract has specific transparency problems. These hypothesis will be evaluated in subsequent chapters. Third, when the causes of

¹⁰⁵ Department of Trade and Industry, *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation* (CM 3898, London, The Stationery Office 1998a) Proposal 7.6

¹⁰⁶ See Hendry, ‘An Analytical Framework for Reform of National Water Law’ Chapter 5 also Quesada, *Water and Sanitation Services in Europe: Do Legal Frameworks provide for “Good Governance”?*

opacity have been properly analysed and demonstrated, it would be appropriate to suggest viable solutions.

2.2. “Privatisation” and Private Sector Participation

Readers may note that in this dissertation the term “privatisation” is often used within quotation marks. This is because “privatisation” is a fuzzy concept that carries different meanings. In the judicial review of the Indonesian Water Law 7/2004, the petitioners insisted that by opening doors for private parties to participate in the sector, the law is an instrument of privatisation although the term privatisation itself is never mentioned by the law. On the other hand, the government representatives insisted that the law was never meant to “privatise” the water sector since it does not regulate the transfer of shares to the private sector.¹⁰⁷ Indeed, under Indonesian State Owned Enterprise Law, “privatisation” is defined as partial or full divestiture of shares belonging to a state owned enterprise.¹⁰⁸ Likewise, in England, when literature uses “privatisation” it often means divestitures.¹⁰⁹

However, “privatisation” has a very broad meaning and is not only limited to divestiture.¹¹⁰ The term “private” often denotes secrecy or opacity whereas the term

¹⁰⁷ *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004* Constitutional Court of the Republic of Indonesia See the original Bahasa Indonesia version, particularly p.412 and p.435. See also dissenting opinion of Judge Mukhtie Fadjar which labels the law as a disguised “privatisation” at p.512

¹⁰⁸ Iwanami, M. and Nickson, A., ‘Assessing the regulatory model for water supply in Jakarta’ 28 *Public Administration and Development* 291 Article 1 (12)

¹⁰⁹ Prosser, T., ‘Public service law: privatization's unexpected offspring’ 63 *Law and Contemporary Problems* 63 Littlechild, S.C., *Privatization, competition and regulation in the British electricity industry, with implications for developing countries* (World Bank 1999) Bakker, K.J., ‘A political ecology of water privatization’ 70 *Studies in Political Economy*

¹¹⁰ Starr, P., ‘The meaning of privatization’ 6 *Yale Law & Policy Review* 6

“public” is often used in equation with transparency. For the economist, “public” is often equated with the “state” and “private” for non-state, whereas for the anthropologist, “privatisation” could mean the withdrawal from previously conceived public spheres, such as from taverns into homes, due to the advent of television.¹¹¹ In this case, what was formerly a question of community engagement and intimacy becomes the pursuit of self-interest or in other words from public action to private concern.¹¹² Then there is a third concept: the “commons” and its kindred “community” which are often invoked in public debate in opposition to market/private or public/state, somewhat in a diversion from the mainstream academic debate.¹¹³ In Wales, the Dwr Cymru “mutual” model where a non-profit company limited by guarantee is established, has been perceived as a representation of the “commons”, where ownership is returned from the private sector to the public. However, the public/private binary is simplistic and inaccurate when applied to the community model such as Dwr Cymru as, on the one hand, they are perceived as a “retreat from the market” and an alternative to “privatisation” while, on the other hand, such a

¹¹¹ Willmott, P. and Young, M., *The symmetrical family* (New York: Pantheon 1973) also quoted in Starr, ‘The meaning of privatization’

¹¹² Hirschman, A.O., *Shifting involvements: private interest and public action* (Princeton Univ Pr 2002) also quoted in Starr, ‘The meaning of privatization’

¹¹³ This is discussed in Bakker, K.J., ‘From public to private to... mutual? Restructuring water supply governance in England and Wales’ 34 *Geoforum* 359 For the invocation of commons as an independent entity in opposition with private/market and public/state, see Barlow, M., *Our Water Commons: Toward a new Freshwater Narrative* (The Commons 2007) Shiva, V., *Water wars: Privatization, pollution and profit* (South End Pr 2002) Rowe, J., ‘The Parallel Economy of the Commons’ State of the World. In the mainstream academic debate, the term commons may include both private or public; it includes open access, group property, individual property and government property. See Ostrom, E. and others, ‘Revisiting the commons: local lessons, global challenges’ 284 *science* 278 also Dietz, T., Ostrom, E. and Stern, P.C., ‘The struggle to govern the commons’ 302 *science* 1907

model is made possible through divestiture and the use of corporate law, both of which are synonymous with “privatisation” itself.¹¹⁴

It is thus difficult to pinpoint the meaning of “privatisation” as it could mean different things: a shift from public (openness) to private (opacity), from state to non state or from the whole (community) to the part (a few or the individual).¹¹⁵ Starr rightly raised an important issue with “privatisation”:

“it is a critical question whether moving from public to private in the sense of state to non-state entails a movement in the other senses: from open to closed (in access to information) or from the whole to the part (particularly in the distribution of benefits)”.

For scholars such as Swyngedouw, Minow, Lobina and Hall, the move from state to non state may always entail the move from open to closed information access but, as will be evaluated later in case studies, this is not categorically true.¹¹⁶

For the sake of precision and to avoid pitfalls in analysis, this thesis uses the term “private sector participation” (PSP) to denote a subset of “privatisation” which deals with shifting of ownership and/or responsibilities of delivering water services to non-state entities. As discussed in various literatures, PSPs have several models, differentiated through risk, duration and the breadth of private sector responsibility:

¹¹⁴ The Dwr Cymru model will be discussed in Section 4.4.3

¹¹⁵ Starr, ‘The meaning of privatization’

¹¹⁶ Swyngedouw, ‘Dispossessing H 2 O: the contested terrain of water privatization’, Minow, ‘Public and private partnerships: accounting for the new religion’, Lobina and Hall, ‘The comparative advantage of the public sector in the development of urban water supply’

Figure 1: Models of Private Sector Participation



While there is no strict categorisation of the PSP model, it is usually divided into these six categories: management contract, affermage, lease, build-operate transfer (BOT), concession and divestiture. Only in a full divestiture model is the asset's ownership transferred to the private sector. Management contracts typically last three to five years and transfer the responsibility of managing utilities to the private sector. In affermage and lease, utilities are responsible for the operations and maintenance of the assets, but not for conducting infrastructure investment.¹¹⁷ The difference between the two is that in affermage, the operator and the private sector share revenue from customer whereas in lease, the operator retains revenue from customers. In BOT, the private sector designs, builds and operates a facility for 15-30 years, in exchange for a fee, and then transfers the asset's title to the government. Concessions provide the rights and obligations for the private sector to operate, maintain assets, collect revenue and for investment while the assets are still legally owned by the public sector until the concession period ends. Finally, in divestiture, the share ownership of a utility is sold to the private sector. This thesis will elaborate, in detail, how divestiture of the water utilities is implemented in England.

Note that the term public private partnership (PPP) is often used as an alternative to PSP, but authors such as Marin include divestitures as a form of PPP

¹¹⁷ Public-Private Infrastructure Advisory Facility, *Approaches to private participation in water services : a toolkit* (International Bank for Reconstruction and Development and the World Bank 2006)

whereas Marques excludes them from PPP, as the public sector is deemed to disengage completely from providing the services, except in regulation.¹¹⁸ It is also important to highlight that the typology of PSPs above simply describes the “business model” of infrastructure used by international financial institutions. Such a model often does not represent the actual institutional configuration in the legal culture where they are imported from, France,¹¹⁹ or the country where the model is transplanted, such as Indonesia. Thus, a concession according to the World Bank may or may not be a *concession* as understood legally in each jurisdiction. This will be dealt with in later chapters.¹²⁰

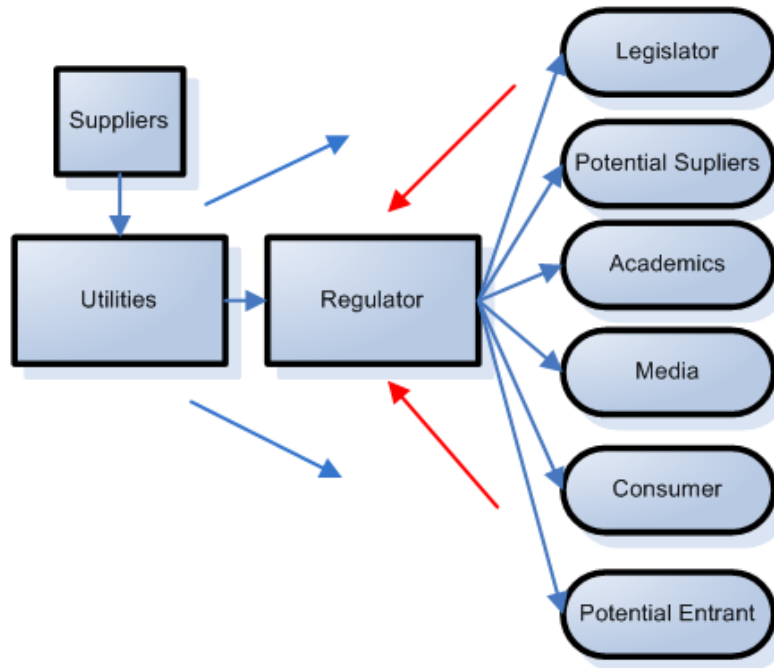
¹¹⁸ Marques, R.C., ‘What are Public-Private Partnerships and the general principles behind such institutional arrangements?’ Regulation Body of Knowledge <<http://www.regulationbodyofknowledge.org/faq/pppPrinciples/>> accessed June 1, 2012 also Marin, *Public-private partnerships for urban water utilities: a review of experiences in developing countries*

¹¹⁹ On why the World Bank chose to export the “French Model”, see Finger and Allouche, *Water privatisation: trans-national corporations and the re-regulation of the water industry*

¹²⁰ See section 6.4.2. for a detailed discussion on this subject

2.3. Information flow and beneficiaries of transparency

Figure 2: Information flow in regulation



Information flows from suppliers to utilities, from utilities to the regulator (and to the stakeholders directly) and from the regulator to stakeholders. The regulator requires full disclosure from the utilities in order to set prices and monitor the utilities' compliance with service levels, customer service and environmental standards.– These will be discussed in detail in later sections. To tackle this problem, water services law or concession contracts are often equipped with a duty for the utilities to furnish the regulator with information (see sections 4.3.4, 5.3.4 and 6.4.5). Nevertheless,

interpreting such information requires expertise and a considerable amount of time and costs.

Relying on the utilities alone to provide information may not be adequate. Stakeholders can reveal and provide alternative information. According to Klein:¹²¹

“Better information can be generated by public hearings and consultations for arriving at regulatory decisions. For example, when information about equipment costs provided by a utility is public, competing equipment suppliers may be able to detect overpriced supply contracts and complain. Equally various interest groups will provide information to support their various claims. Where various companies compete for water contracts - even if only from time to time - the regulator may benefit from information generated by an aggressively bidding competitor. Together with yardstick information otherwise obtained and share price information from companies quoted on the stock market, the regulator would then get the fullest possible set of data to arrive at good decisions.”

In countries where regulatory capacity is weak and public expectation is high, stakeholders would have a higher stake in participating in the regulatory process. Such participation would require full information from regulators and utilities. Stakeholders, notwithstanding their diverse interests, comprise different parties which have an interest in information regarding the utility.¹²² They can form alliances and contribute their knowledge to scrutinise the information in the regulatory process. Disclosure may aid the regulator in deciphering information submitted by the utility.

¹²¹ Klein, M.U., 'Economic Regulation of Water Companies' [Bank Policy Research Working Paper No. 1649] 2010 SSRN eLibrary

¹²² See Boehm, F., 'Anti-Corruption Strategies as Safeguard for Public Service Sector Reforms' (working paper, available at www.icgg.org/downloads, 2007), also Boehm, F. 'Regulatory Capture Revisited—Lessons from Economics of Corruption' (Internet Centre for Corruption Research (ICGG) Working Paper 2007).

Note that the above explanation by Klein on the benefits and role of disclosure in regulation only represents a particular model of regulation as envisaged by the “economic regulation” school, discussed earlier. The danger in this is that the multiple ranges of stakeholders outside the utilities and the regulator could be perceived only as “auxillary” to the whole process: the role of disclosure is to aid regulatory decisions and thus making the regulatory process more efficient. However, as discussed in the literature review section, there are public law approaches to transparency which suggest that the purpose of transparency is not confined to enhancing regulatory decisions. Since all stakeholders are both the beneficiaries (and the “principal”) of regulation, disclosure which serves any regulatory objectives – not only in making regulatory decision more efficient – should be promoted.¹²³ This is evident in the English regulatory system, which provides discretionary power for the regulator in disclosing regulatory information, if it is perceived to be in the “public interest”.¹²⁴ The “public interest” here does not only mean an efficient decision making process, there are also equity and rights based considerations.¹²⁵

This section clarifies the intended beneficiary for transparency in this thesis. Transparency is to serve the “public interest” which – as will be seen in the next sections – oftentimes must be decided on case by case basis. In certain cases there might be public interest in competition, which then requires disclosure of certain

¹²³ Prosser, ‘Regulatory contracts and stakeholder regulation’

¹²⁴ “*The Secretary of State may arrange for the publication, in such form and in such manner as he considers appropriate, of such information relating to any matter which is connected with the carrying out by a company holding an appointment under Chapter I of Part II of this Act of the functions of a relevant undertaker as it may appear to him to be in the public interest to publish.*” S.201 of the Water Industry Act 1991 (England)

¹²⁵ In general, see Feintuck, M., “*The public interest*” in regulation (Oxford University Press 2004)

information. In some other cases, there might be a public interest towards accountability.

Since information is non-excludable and non-rivalrous, the same information resulting from disclosure will benefit several stakeholders at the same time. Information on utilities' cost structures, which may benefit entrants, could also benefit consumers for accountability purposes. Thus, transparency does not serve a single regulatory objective or a single stakeholder.

Nevertheless, there may be competing interests in transparency. As the thesis will elaborate, such interests are recognized provided that they are legitimate. Legislation protects certain interests from disclosure. The intensity of protection differs from one jurisdiction to another. When a competing interest arises, a balancing test must be sought. In some cases there is a public interest towards disclosure and in some other cases there is a public interest towards non-disclosure. The thesis – through the case studies -- will elaborate how the balancing test is performed, applied and contextualized in a water utility regulation.

2.4. The Working of a Transparency System

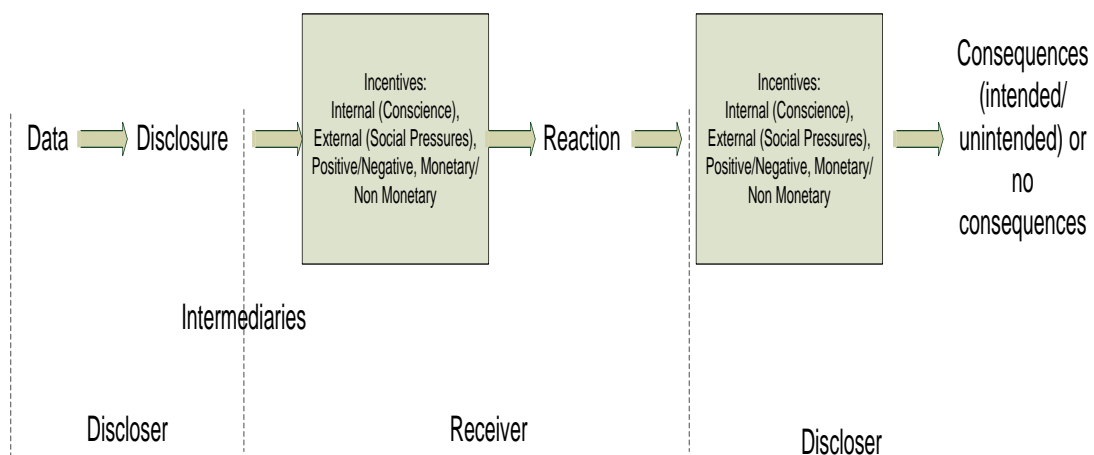


Figure 3: Transparency Mechanism¹²⁶

A transparency framework will always involve at least two parties: the discloser on one side and the receiver on the other. Among the discloser and the receiver there is information asymmetry. The discloser may tend to exploit the receiver's lack of knowledge to their own benefit. In this context, receivers are the general public; they could also be water consumers, the local population, investors, potential investors or governmental agencies. Their interest and stakes in information being disclosed could differ from one to another. In certain cases, there are third parties involved in the disclosure process: the intermediaries. Their role is in making information more comprehensible and understandable for the receivers. This may comprise civil society, rating agencies, auditors or regulators. The activities of the intermediaries may include ranking institutions, rating them, benchmarking the performance of institutions or simply in making the language of the disclosure more understandable in layman's terms.

The transparency mechanism as depicted in **Figure 3** is a process started from the discloser's part in disclosing data or information. The role of the legal framework at this stage is in determining which data or information should be disclosed, in which quality and format, the deadline for such activities and the legal consequences for

¹²⁶ The above chart is inspired by the work of Weil, Fung, et al who characterise two important elements in the transparency cycle: disclosers and users. They theorise that in order for a disclosure policy to be effective, it must be "embedded", that is to say that the disclosure of information becomes a part of the disclosers/users' routine in daily decision making. See Weil, D. and others, 'The effectiveness of regulatory disclosure policies' 25 *Journal of Policy Analysis and Management* 155

failing to disclose. This is particularly important for “active” disclosure rules although some specifics such as format and timing is also important in “passive” disclosure rules – the differences between them will be dealt in the next section.

A legal framework has the role of aligning with the incentive of the receiver to react against such disclosure. Such incentives may be “internal”, existing within oneself, such as conscience or values, or could be “external”, in the form of social (such as reputation) or legal sanctions. Legal frameworks should provide means for the receivers to ‘voice’ their concern. This is manifested in the form of an accountability mechanism where information is exchanged and praise or blame are given, or through public hearings where customers’ complaints are heard, or through redress mechanisms. It is conjectured that the Dutch sunshine regulation of its water utilities as discussed above would be effective only when conducted in an adequate “naming and shaming” framework involving internal ‘carrot’ (for managers) and external ‘stick’ (from municipalities).¹²⁷

Finally, the whole transparency mechanism needs to be aligned with incentives in order to produce positive results – in the form of rectification of damages, behavioural change on the part of the discloser, higher efficiencies or more sustainable water services. This research will not focus on the *results* of the transparency mechanism as they are empirical in nature and can only be appropriately addressed through disciplines other than law. It will instead focus on *how* such a transparency mechanism is provided through legal framework.

¹²⁷ Saal and De Witte, ‘Is a little sunshine all we need? On the impact of sunshine regulation on profits, productivity and prices in the Dutch drinking water sector’

It is apparent from the above exposition that the notion of “transparency” is much more complex than that of “disclosure”. Disclosure is only a part of the transparency mechanism. In order to be transparent, information disclosed may still need to be tailored to make it more comprehensible for the receiver. Intermediaries could play an important role in this process.

2.5. Passive and active disclosure rule

Disclosure rules can be divided into “passive” as opposed to “active” disclosure rules. Passive disclosure rules establish the right of the receiver to file an information request to public authorities. As a general rule, the receivers are entitled to request any information that the public authority holds, as long as they are not exempted by legislation – a typical feature in “access to information” laws. On the other hand, active disclosure rules establish specifically the types of information that should be published by disclosers. Disclosers do not have any obligation to publish any other information, unless as stated in the legislation. Legislation can have both “active” and “passive” elements of disclosure, however, a freedom of information law will have a lot more “passive” disclosure rules than “active” ones.

Here, we can see that differentiating between active versus passive disclosure rules will be helpful for the analytical framework. In active disclosure rules, there is a need to specify the exact type of information to be published, the format, manner and timing for such disclosure. From one point of view, active disclosure rules may actually require the discloser to produce information, whereas, in passive disclosure rules, the discloser is only required to reveal information which already exists in their databases, etc., on an “as is” basis.

Furthermore, in active disclosure mechanisms, there is scope for the legal framework to require that such information be processed in a way that would make it

comprehensible and understandable for the public. Thus, there is room – for the discloser – for interpreting such information so long as it complies with the required disclosure standard. Conversely, in passive disclosure provisions, there is less scope to require that the information be processed before they are released. Indeed in passive disclosure provision, information is required to be released on an “as is” basis. Some freedom of information laws contain criminal provisions for tampering with such information.¹²⁸

As there is room for interpretation in active information provisions, the problem of “creative compliance” may occur. The discloser may provide information only to the extent that it is beneficial for them and, at the same time, conceal information which may jeopardise their position. Data can also be tailored and presented in a particular way in order to create the impression that nothing has gone wrong.

In passive information provision, the ‘playing ground’ for the discloser would be the exemption clauses. Since there is less advantage in tampering with the disclosure process, there is less room for creative compliance in the presentation of such information to the public. The only way for the discloser to prevent information from being released is by arguing that it falls under the exemption clause. Normally, (but not always—this will be discussed further in subsequent chapters) the exemption clause may contain a burden of proof of harm and a public interest test.

¹²⁸ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik See the criminal sanction on Art 55 for providing misleading information. See also FoI Act 2000 (England) Section 77

Due to the requirement to disclose on an “as is” basis, passive disclosure rules may rely heavily on the role of intermediaries to make them more comprehensible for the receiver. Information is often released in bulk in which further processing by experts possessing specific knowledge on the subject matter may be required.

Active disclosure mechanisms can be embodied in sectoral or general rules, contractual obligations, general administrative laws or specific licence conditions. The legal consequences for breaching disclosure rules would, therefore, depend on the regulatory framework used: it could be in the form of licence infringement, breach of contract or a violation of a sectoral rule. On the other hand, passive disclosure provision is most likely to be contained in access to information legislation.¹²⁹

How do active and passive disclosure rules interact? Active and passive disclosure rules complement each other. Passive disclosure rules can be used to **verify** disclosures made under the active provision of information. If there are indications that the information presented under the active disclosure rule is inaccurate or misleading, more details can be obtained through a passive disclosure rule. Secondly, passive disclosure rules can also be used to cover types of information which are not included in the active disclosure mechanism.

¹²⁹ FoI rules also contain active information provision, for example, the UK FoI model publication schemes. See FoI Act 2000 (England) Sections 19-20 or Indonesian FoI Law 14 Year 2008 Art 9. See also http://www.ico.gov.uk/what_we_cover/freedom_of_information/publication_schemes/definition_document_ndpb_england.aspx accessed March, 20, 2010

Likewise, a passive disclosure rule cannot stand by itself. It would be too costly for the receiver if they have to file a request for information every time new information is produced (provided that they know such information exists).¹³⁰ Moreover, a passive disclosure rule does not require the production of new information but simply the revelation of existing information to the public. Hence, without an adequate active disclosure rule, the system will not be adequately transparent.

2.6. An analytical definition of transparency

By no means is the term “transparency” easy to define. The word originates from the Latin phrase *trans* (through) and *parere* (appear).¹³¹ This Latin meaning influences the modern dictionary definition of the word “transparent”: “(of a material or article) allowing light to pass through so that objects behind can be distinctly easy to perceive or detect”.¹³² Other dictionaries also invoke similar definitions: “fine or sheer enough to be seen through”; “free from pretence or deceit”; “readily understood”.¹³³

In the academic discourse, the notion of “transparency” has more or less a similar understanding with the standard dictionary definitions but is sometimes intertwined with the accountability concept. According to Finkelstein, “transparency”

¹³⁰ FoI Law may provide or be linked to Information Asset Register, obligating public authorities to disclose the list of information in their possession. Only the lists are required to be disclosed, not the whole information.

¹³¹ Oxford University Press, ‘Oxford Dictionaries’ (Oxford University Press, 2011) <<http://oxforddictionaries.com/definition/transparent?q=transparent>> accessed December 26, 2011

¹³² Ibid

¹³³ Merriam-Webster, ‘Merriam-Webster Online Dictionary’ (Merriam-Webster, Incorporated, 2009) <<http://www.merriam-webster.com/dictionary/transparent>> accessed December 26, 2011

means “a characteristic of those policies that are easily understood, where information about the policy is available, where accountability is clear, and where citizens know what role they play in policy implementation”.¹³⁴ Obviously this definition focuses only on the transparency of policy and incorporates the notion of accountability and clarity into it.

In a regulatory context the term is often broadly defined. A broad framework for assessing regulatory governance was introduced by Stern and Holder and comprises of: (1) clarity of roles and objectives (between regulatory institutions), (2) autonomy from political intervention, (3) participation, (4) accountability – which they explain as ways for challenging a regulator’s decision, (5) transparency – which they define as “a requirement by regulator to explain their decisions and processes” and (6) predictability – which is aimed at firms understanding the rules of the game.¹³⁵ In this framework, the distinction between transparency and accountability is less clear, accountability is defined “as the ability to challenge” while transparency is equated with reason giving, which is also a form of accountability.

Research on “Regulatory Transparency” by NERA operationalises Stern and Holder’s framework above into: (1) Clarity of roles and objectives, (2) predictability, (3) transparency of decisions, (4) accountability, (5) participation, and (6) open

¹³⁴ Finkelstein, N.D., *Introduction: transparency in public policy* (N. D. Finkelstein ed, Palgrave 2000) p.6

¹³⁵ Stern, J. and Holder, S., ‘Regulatory governance: criteria for assessing the performance of regulatory systems An application to infrastructure industries in the developing countries of Asia’ 8 Utilities Policy 33

access to information.¹³⁶ There is an overlap in NERA's framework as Regulatory Transparency is deemed to cover wide elements from accountability to predictability to participation. *Transparency of decision*, according to their research is operationalised by publishing 'major' regulatory decisions in the public domain and consultation responses. This is an overlap with the other element, *open access to information*, which consists of making available to the public primary legislation, licences or contracts, consultation documents and regulator's comments on consultation documents or on determinations.

Quesada, in analysing good governance in the water services sector built her framework from three general themes: transparency, participation and access to justice. Transparency is divided into the following categories: (1) whether or not regulatory documents are in the public domain, (2) whether the tariff setting process and quality service procedure are regulated, (3) whether decisions are published, (4) whether the reasoning behind decisions are published, (5) and whether there are formal mechanisms to protect access to information.¹³⁷ Quesada's framework differentiates between the publication of decisions and the publication of 'reason-giving' underlying a decision, however, the research was focused only on tariff setting. The last element, "mechanisms to protect access to information" is a relevant and important element in evaluating transparency, but since the existence of an access

¹³⁶ Hern and others, *Regulatory Transparency: International Assessment and Emerging Lessons A Final Report for the World Bank*

¹³⁷ Quesada, *Water and Sanitation Services in Europe: Do Legal Frameworks provide for "Good Governance"*?

to information regime alone is not a guarantee to transparency,¹³⁸ such an element still requires more detailed breakdown.

Another example where transparency is defined broadly in the context of regulation is Lodge-Stirton's concept of "transparency mechanisms" which comprises "*information, choice, representation and voice*".¹³⁹ In this understanding, "transparency" can also encompass "participation". The legal analysis of one of the instruments, information, is already complicated enough. Thus, such a definition of transparency is too broad to be applied to this dissertation as it would require the analysis of legal instruments underlying all of the four elements. What this thesis requires is a sharp and focused definition of transparency to be used as an analytical tool.

On the other hand, some authors lay emphasis on disclosure. Hall and Rogers suggest that transparency and accountability in water governance "*are built on the free flow of information*".¹⁴⁰ Florini's definition of transparency is more specific: "*the release of information by institutions that is relevant to evaluating those institutions*".¹⁴¹ Similar to Finkelstein, it still implicitly includes the notion of accountability by invoking two kinds of institution, the one that releases the

¹³⁸ It would depend on how the access to information regime facilitates transparency. This could be benchmarked through a number of ways but this thesis will focus on applicability, the exemption clause and the balancing test.

¹³⁹ Lodge and Stirton, 'Regulating in the Interest of the Citizen: Towards a Single Model of Regulatory Transparency'

¹⁴⁰ Rogers and Hall, *Effective water governance (TEC background papers no. 7)*

¹⁴¹ Florini, A.M., 'Does the invisible hand need a transparent glove? The politics of transparency' (Annual World Bank Conference on Development Economics, Washington, DC http://www.worldbank.org/research/abcde/washington_11/pdfs/florinipdf)

information and that which evaluates such institution. In a later publication she offers another definition: “*the degree to which information is available to outsiders that enable them to have informed voice in decisions and/or to assess the decisions made by insiders*”.¹⁴² This definition contains a qualifier: in order to be transparent, the information must have the capacity to *enable*. Such a definition requires that the disclosed information has particular qualities.

“Understandability” has also been the focus of transparency debates. This is reflected in the work of Hall and Rogers, which suggests that in good water governance “*language should be accessible and understandable and all policy decisions should be transparent*”.¹⁴³ This is also reiterated by the International Monetary Fund as: “*a process by which information about existing conditions, decisions and actions is made accessible, visible and understandable*”.¹⁴⁴

Michener and Bersch suggest that transparency has two prerequisites: “visibility” and “inferrability”.¹⁴⁵ By visibility they mean completeness and a high likelihood to be found, whereas “inferrability” reflects its usefulness or accuracy, somewhat equal to Florini’s *to enable*. Their definition also has little to do with accountability. While it adds to existing definitions, such a concept may be

¹⁴² Florini, A., ‘Introduction: The Battle Over Transparency’ in A. Florini (ed), *The right to know: transparency for an open world* (Columbia Univ Press 2007)

¹⁴³ Rogers and Hall, *Effective water governance (TEC background papers no. 7)*

¹⁴⁴ International Monetary Fund, ‘International Monetary Fund Reports on the International Financial Architecture by the G22 Working Group on Transparency and Accountability, Working Group on Strengthening Financial Systems and Working Group on International Financial Crises (Group of 22)’

¹⁴⁵ Michener, G. and Bersch, K., ‘Conceptualizing the Quality of Transparency’ (Midwest Political Science Association, Chicago, March 31-April 3, 2011) <<http://gregmichener.com/Conceptualizing%20the%20Quality%20of%20Transparency--Michener%20&%20Bersch.pdf>> January 20, 2012

problematic on two grounds. First is the encouragement of “visibility” by assuming that “*the more information ‘stares people in the face,’ the more likely it is that people will act on that information*”.¹⁴⁶ This is not completely correct as information overload may trigger cognitive biases and affect decision making capability.¹⁴⁷ Only relevant information should be actively disclosed to stakeholders. Furthermore, Michener and Bersch consider that disclosure through a freedom of information regime “*does not fulfil one of ‘transparency’s’ two necessary conditions, visibility... In other words, there is no guarantee that requested information will be made transparent*”.¹⁴⁸ As making all information public at the same time entails high cost (for some countries it may be impossible), an on-demand information request remains relevant. While the author agreed that information disclosed through FoI may not be necessarily of sufficient quality (information is disclosed “as is”, there is no obligation to make it more “inferable”), it is arguable that countries which enable disclosure through FoI are certainly more transparent than those that do not.¹⁴⁹ Thus, pinpointing transparency based on the quality of information alone will not be able to capture a continuum of conditions where (1) there is complete opacity or (2) there are disclosures – irrespective of quality, or (3) there are disclosures with specific quality

¹⁴⁶ Ibid

¹⁴⁷ See Toffler, A., *Future shock* (Bantam 1984) p 350-358 Macrae, C.N. and Hewstone, M.R.C., ‘Cognitive biases in social categorization: process and consequences’ 68 *Advances in Psychology* 325 For more contemporary research see Schwartz, B., *The paradox of choice: Why more is less* (Harper Perennial 2005) p.52-63; Schwartz, B. and others, ‘Maximizing versus satisficing: Happiness is a matter of choice’ 83 *Journal of Personality and Social Psychology* 1178

¹⁴⁸ Michener and Bersch, ‘Conceptualizing the Quality of Transparency’

¹⁴⁹ The Preamble of The Aarhus Convention equates transparency with access to information, irrespective of its quality. Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 25 June 1998 (Aarhus Convention) 38 *International Legal Materials (ILM)* (1999) 515

of information. Therefore, for the purpose of comparison of the jurisdictions evaluated in this thesis, it is important to perceive transparency in context and for the analytical definition of transparency to incorporate these circumstances.

Of all those definitions presented above, there is only one similarity without which the definition of transparency would not be generally acceptable: *information*. For that reason, this thesis incorporates information as the *sine qua non* of transparency. Other notions in addition to information, such as accountability, will be considered, but it is only one among the many reflections on the quality of information that this dissertation will address below.

Instead of attempting to create a rigid definition, the author offers a flexible dimension of transparency by building on the notion of information. The dimension of transparency consists of, first, the availability of information, as without available information entities will have nothing to disclose. If information is not available, then it must be created although this may entail cost. For utilities regulators this is materialised, for example, by way of imposing regulatory accounting standards and obligating utilities to submit reports to them or by directly investigating them.

Second is the public disclosure of information. Information availability is not yet a “transparency” in this thesis framework if it is not followed by public disclosure. Information which is held in secrecy, for example, is not transparency, although it is already available somewhere. In order for transparency to exist, such information must be in the public domain;

Third is the “manner of disclosure”. In this third category the notions of quality of information could be applied depending on the case. The manner of disclosure can be evaluated based on several categories:

- (1) The comprehensibility of such information. If information is vague or not comprehensible, then it is of no use to the users. This also denotes clarity. Regulation is transparent “*If someone subject to the law can understand what is expected of her, can understand and comply with the commands of the law, and can foresee the consequences of compliance or noncompliance...*”;¹⁵⁰ (2) The medium in which such information is disclosed; for example, the internet, leaflet, state gazette or newspapers;
- (3) The timeliness of disclosure;
- (4) Any relevant reasoning or rationale – this is of particular relevance to accountability;
- (5) The comprehensiveness of information; and
- (6) The accuracy of information.

¹⁵⁰ Mock, W.B., ‘An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development’ Dickinson Journal of International Law (now Penn State International Law Review), Vol 18, No 2, p 293, 2000

2.7. Chapter Conclusion

This chapter starts by describing the literature discussing transparency implication on the delegation of public service to non state entities. Several authors criticize “privatisation” for reducing or deminishing transparency while others denied such premise. Some other authors conclude that “regulation by contract” model suffers from lack of transparency. There has been claim that the transparency threshold for a company should be put in the context of its market power. Thus, this chapter implies that there are corellation between the specific form of ownership and regulatory model towards transparency and that stronger market power must be associated with more transparency. Whether these hypotheses are true or not will be evaluated in later chapters.

This chapter also explain the various meaning of “privatisation” and clarifies to use of the term “private sector participation” in the thesis to denote a subset of privatisation in terms of ownership. The flow of information in the regulatory process are elucidated, so as the working of the transparency system. The thesis further differentiates between “active” and “passive” disclosure and elaborate why such distinction would be important for the analytical framework. Finally, the chapter elucidate and clarify what transparency meant and how this could be used in the thesis.

3. ANALYTICAL FRAMEWORK

In determining the object of analysis one must first identify the institutions and the objects of regulation where transparency can be employed. This is conducted by reviewing existing literature which depicts the stages and subject matter of water utilities' regulation.

Hendry's framework in analysing the legal framework of water services comprised the following: the structure, ownership and control (of water utilities); the duties of supply; standards of water supply and treatment; economic regulation and business planning; customer protection and service standard and water conservation.¹⁵¹ Meanwhile, according to Plummer and Cross¹⁵² corruption¹⁵³ may occur across the value chain of water projects. These "value chains" are a creation of policy/regulation, project planning and budgeting, management and programme design, tendering and procurement, construction, operation and maintenance and up to the final stage when the service is delivered to the consumer. The difference between the two approaches is that the Plummer and Cross framework focuses on procurement but less on the subsequent regulatory process which is emphasised by Hendry. The analytical framework used here must, therefore, combine the two.

3.1. Ownership and Delegation to Private Sector

¹⁵¹ Hendry, 'An Analytical Framework for Reform of National Water Law' Chapter 5

¹⁵² Plummer, J. and Cross, P., 'Tackling Corruption in the Water and Sanitation Sector in Africa' *The Many Faces of Corruption* 221

¹⁵³ Corruption is a reflection of a governance failure which occurs due to the existence of wide discretion, combined with the lack of transparency and accountability. See Klitgaard, R.E., *Controlling corruption* (University of California Press 1988) 83

Procurement and the preceding decision to delegate services is an important stage. When Jakarta's Regional-Owned Water Utility was in financial trouble, the World Bank got involved and persuaded the Indonesian Government to privatise its water utilities.¹⁵⁴ The decision to privatise water in 1997 never involved the public. There was no public discussion or debate.

From the above experience, it is then imperative for the analytical framework to address the question of delegation to the private sector, unless the delegation question is determined at the legislative process, in which this thesis assumes that there is transparency. Noting that there are power asymmetries between states and multinationals and the characteristics of water as a political good, the current Human Right to Water agenda explores the appropriate procedures for transparency and public participation in the decision making process in instances where governments seek to involve the private sector in water services.¹⁵⁵ The General Comment 15 on the Human Right to Water asks states to guarantee the right to participate in any decision making process, which include also the "full and equal access of

¹⁵⁴ Harsono, A., 'When Water and Political Power Intersect' Nieman Reports <<http://www.nieman.harvard.edu/reportsitem.aspx?id=101044>>

¹⁵⁵ de-Albuquerque, C., *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, A/HRC/15/31* (2010) <<http://www2.ohchr.org/english/issues/water/ieexpert/docs/A-HRC-15-31-AEV.pdf>> February 11, 2011 See recommendation (e): "*The process of decision-making and implementation, any instruments that delegate service provision including contracts, and instruments that outline roles and responsibilities must be transparent, which requires the disclosure of adequate and sufficient information and actual access to information.*"

information” concerning water held by states or third parties.¹⁵⁶ The decision to delegate should be democratic, participatory and transparent.¹⁵⁷

Some of Human Right to Water advocates went as far as suggesting a referendum for the model for decision making if privatisation is to be adopted, whereas the private sector tends to consider that discretion from exercised by a democratically elected government is sufficient.¹⁵⁸

Nevertheless, before discussing the issue of delegation to the private sector and its procurement, central to the analytical framework is how the question of ownership is resolved in the legal framework. Prior to ascertaining this, it would be required to provide an overview of the legal and institutional frameworks in each case study as well as an analysis of each jurisdiction’s mode of ownership and regulation. Only when there is clarity on the question of ownership in the legal framework, what follows next would be the selection of private providers through bidding and contract negotiation.

Discussion on procurement may not be applicable to England where its utilities are fully divested but it is certainly relevant in Victoria and Jakarta. Again, in

¹⁵⁶ United Nations, *Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/2002/11, 20 January 2003 (2003) para 48

¹⁵⁷ de-Albuquerque, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, A/HRC/15/31 para 34

¹⁵⁸ Id

procurement, the question of transparency is relevant.¹⁵⁹ The symptom where the private sector bribes officials to win a water contract is not specific to developing countries. Miloon Kothari, the United Nations Special Rapporteur on Adequate Housing (2000-2008) and Hall pointed out the lack of transparency in the French water concession system, and referred to the case where Suez-Lyonnaise and Vivendi were convicted by a French court for paying bribes to obtain water concessions and received prison sentences.¹⁶⁰

One part of the procurement chain is the publication of the final contract. This is of relevance due to the experiences of several countries in which the terms of the final contract is kept secret.¹⁶¹ The Independent Expert on the Right to Water, in her report, outlined that the:

“subsequent process of tendering, bidding and contract negotiation also must be transparent. The terms of reference and the final contract should be made

¹⁵⁹ Boehm and Olaya, ‘Corruption in public contracting auctions: the role of transparency in bidding processes’

¹⁶⁰ Kothari, M., ‘Privatising human rights—the impact of globalisation on adequate housing, water and sanitation’ Social Watch Report. On the case of Grenoble, Angoulême and St-Denis See Hall, D., ‘Water in Public Hands’ <<http://world-psi.org/Template.cfm?Section=Home&CONTENTID=10168&TEMPLATE=/ContentManagement/ContentDisplay.cfm>>

¹⁶¹ For Indonesia See Daryanto, A., *Jawaban Surat KRuHA (Letter No. 581/DIV.T&P/XI/2011 dated November 8 2011 on PAM JAYA's response to FoI Request by KRuHA)* (PAM Jaya 2011) ; Al'Afghani, M.M. and others, *Transparansi Lembaga-lembaga Regulator Penyediaan Air Minum Di DKI Jakarta* (ECOTAS/KRuHA/TIFA, 2011) ; Disclosure of final contracts are also denied in Slovakia. See Havlicek, R., ‘Learning from Privatisation of Water Services in Trencin, Slovakia’ in B. Brennan and others (eds), *Reclaiming Public Water: Achievements, Struggles and Visions from Around the World* (Transnational Institute and Corporate Europe Observatory 2005) also in Gdansk and Hungary see Hall, D., ‘Introduction’ in B. Brennan and others (eds), *Reclaiming Public Water: Achievements, Struggles and Visions from Around the World* (Transnational Institute and Corporate Europe Observatory 2005)

available for public scrutiny and commenting. Commercial confidentiality must not jeopardize the transparency requirements provided for under the human rights framework”.¹⁶²

As such, the analysis will include the following themes:

- 1) Overview of the legal and institutional framework
- 2) Policy on Involving the Private Sector
 - a. Ownership and Regulatory Model
 - b. Procurement
 - c. Publication of Contract.

3.2. The Regulatory Decision Making

The next focus should be the regulatory institutions and the objects of regulation. In many cases, one of the tasks of the regulators is to issue licences. As natural monopolies, water utilities licences are often exclusive to a particular area and provides the licence holders with a legal monopoly to operate in that area. Licences normally come with conditions.¹⁶³ The conditions need to be clear and transparent and

¹⁶² de-Albuquerque, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, A/HRC/15/31 recommendation (e) also para 36: “When deciding to delegate service provision, and once that fundamental decision has been taken, the subsequent process of tendering, bidding and contract negotiation also must be transparent. The terms of reference and the final contract should be made available for public scrutiny and commenting. Commercial confidentiality must not jeopardize the transparency requirements provided for under the human rights framework.”

¹⁶³ For the importance of licences in English utility regulation, see Graham, *Regulating public utilities : a constitutional approach* p.33

the granting of such licences must also be transparent. The transparency of licences is correlated with some other aspects: service levels and violations of service levels – both will be discussed in the next sections. These service levels could be imposed within licence conditions. Licences could be revoked by government or regulators when service levels are violated. The transparency of licensing provides justifications for governmental actions if the company breaches the requirement imposed in their licences. The transparency of licensing thus depends on three conditions: the criteria for approval, the conditions of licences and whether there are obligations to publish licences.

Not least important in discussing regulatory institutions is the debate on regulatory independence.¹⁶⁴ To ensure independence, the process of selecting regulatory personnel must be transparent. However, it is a commonplace that in developing countries, regulators are faced with limited capacity, limited commitment, limited accountability and limited fiscal efficiency.¹⁶⁵ There have been cases where positions in the regulatory body are filled with incompetent persons or people having a conflict of interest with the regulated companies. It is, therefore, important to ensure that the criteria and eligibility for regulator's appointments are made transparent, the

¹⁶⁴ See for example Majone, 'The regulatory state and its legitimacy problems' Smith, W., 'Utility regulators: the independence debate' 127 Public Policy for the Private Sector Scholten, M., 'Independence vs. Accountability : Dilemma or Misperception?' (The Netherlands Institute of Government Annual Work Conference, Maastricht, 26 November 2010)

¹⁶⁵ For discussion on regulation in developing countries see Laffont, *Regulation and development*; also Estache, A. and Wren-Lewis, L., 'Towards a Theory of Regulation for Developing Countries: Insights from Jean-Jacques Laffont's last book' Journal of Economic Literature, 47 (3) 729 drawing on Laffont's latest work

capability of the prospective candidates is communicated to the public and that existing or potential conflicts of interest are disclosed.

Information is the prerequisite of regulation (See section 2.3: Information Flow in Regulation above).¹⁶⁶ Without any power to acquire information from utilities or other parties, it would be impossible for regulators to carry out their duties. At the same time, the breadth and depth of information available in the public domain will depend on the aforesaid power to acquire information *and* if there are disclosure policies that would enable regulators to disclose regulatory information.¹⁶⁷

As Hendry¹⁶⁸ and Graham¹⁶⁹ both note, one of the regulatory tasks is to ensure that providers maintain service levels. Service levels, in addition to tariffs and protection of vulnerable groups, are essentially the heart of regulation. It is – in addition to determining prices or rate of return – one of the primary reasons why a water company is regulated and a manifestation of the price that consumers are paying. Therefore, it is logical if consumers are informed about what the service levels are since it is what they can legally expect to get from the water company. Transparency of service levels requires not only that the standards of supply, customer service, compliance review and consumer grievances are made transparent but also that non-compliance with service levels and the consequences for companies in breach be disclosed.

¹⁶⁶ In general see Laffont and Tirole, *A theory of incentives in procurement and regulation* also Burns and Estache, 'Infrastructure concessions, information flows, and regulatory risk'

¹⁶⁷ Graham, *Regulating public utilities : a constitutional approach* p.31-38

¹⁶⁸ Hendry, 'An Analytical Framework for Reform of National Water Law' Chapter 5

¹⁶⁹ Graham, *Regulating public utilities : a constitutional approach* p.39-40

Service levels could be elaborated on in the form of legislation or, alternatively, embodied in a contract. There could be a problem with transparency if the service levels are set through contractual terms – which are not published – rather than if they were set through legislation, which by default is always promulgated.

Closely related to service level is the utilities' investment policy. Regulation can serve many values: environment, equity or higher water quality. This could trigger trade-offs in the “regulatory quadrangle”: prices, network expansion, water quality and the environment. If utilities invest in expanding the network to provide more coverage, then less money is spent on investing in other priorities. What is it that the consumer really wants? Better water quality, more extension to the poorer consumers or higher environmental standards? Consumers need to be informed of the utilities' investment plans so that they can give proper feedback. Hence, utilities' investment planning should be made transparent and participatory.

At the same time, network expansion or other forms of investment as discussed above could also mean higher prices. To some who cannot afford a price hike, such burdens are unacceptable. In developing countries especially, utilities' prices are politically sensitive. There have been cases in the past where a riot occurs because of price increases.¹⁷⁰ In big cities where the gap between the rich and the poor is wide, prices could be related to supply security. There have been cases in Jakarta where main water pipes are being tapped into illegally by the citizens to

¹⁷⁰Wood, D., ‘Bridging the Governance Gap: Civil Society, Democratization and Electricity Sector Reform’ (Arusha Conference, “New Frontiers of Social Policy” – December 12-15, 2005) <http://pdf.usaid.gov/pdf_docs/PNADO643.pdf> accessed July 03, 2010

provide for their daily consumption as they cannot afford to pay the price.¹⁷¹ More investment may require a tariff increase, but a tariff increase may provoke unrest.¹⁷² The private sector tends to take the position that a tariff increase is the only solution as they believe that the poor actually pay more with the status quo.¹⁷³ However, previous research by Bakker indicates that the discussion on willingness to pay is too simplistic as it does not take into account disincentives embedded within the current system, such as high transaction costs and high connection fees.¹⁷⁴ In order to mitigate such adverse effects, cross subsidisation might be required. Furthermore, to a certain extent, even the lower part of the tariff band may need to get a tariff increase on the condition that more flexibility is given to the poor. In order to be legitimate, cross subsidisation and the increasing of the tariff rate needs to be effectively communicated to the poor. This requires transparency of the tariff setting methodology for the consumption of intermediary organisations such as civil society, and a simplified

¹⁷¹ 'Water Worries: Special Issue' *The Jakarta Globe* (July 25, 2009) <http://www.thejakartaglobe.com/pages/downloads/Water_Worries.pdf> accessed December 4, 2010

¹⁷² Ibid. According to a former Jakarta regulator: *"This is a very difficult puzzle. If you want to raise the tariff on poor people to create equilibrium with rich people, there will be social unrest — even though they are paying more for vendor water. It's a vicious cycle."* At p. 6

¹⁷³ Ibid. In the words of PT Palyja (The private concessionaire, a subsidiary of Suez Environnement in Jakarta) Director Philippe Folliasson: *"...note that the city's poor who don't have piped water pay 20 times more than the current tariff rate to water truck gangs, and inflation alone dictates that rates must be increased. "The only way forward is to expand the network, increase connections and make sure everyone has access to piped water."* At p.6

¹⁷⁴ There are higher transaction costs to connect in the form of: infrastructure costs to build storage due to intermittent supply, line-ups and time off work to pay bills (for those without access to banking or regular income), difficult geographical position requiring more investment to connect and lack of security of tenure. Private sector also has disincentive to extend into unprofitable area as they exist in the lower part of the tariff band, hence, will indirectly affect their revenue collection. Bakker, K., 'Trickle Down? Private sector participation and the pro-poor water supply debate in Jakarta, Indonesia' 38 *Geoforum* 855

explanation of a tariff increase combined with ease of payment mechanisms for the poor.

When a utility fails to submit the required information, or if it is in breach of its service level, investment or customer service obligation, then typically the regulator will provide sanctions. How sanctions are imposed and their underlying rationale is, therefore, an important part of the analytical framework. Transparent and accountable sanctioning will provide legitimacy. On the other hand, reckless sanctioning depicts partiality or incompetencies in regulating.

Next, the framework focuses on *redress*.¹⁷⁵ Redress is an important feature of legal accountability and is relevant to all parties: utilities, consumers and other stakeholders. Transparency brings legitimacy and credibility into the redress system. In normal circumstances, the courts are the primary institutions referred to for redress. However, water services disputes are of a kind which require quick settlement and the specific expertise of the industry. There are different ways in which redress can be provided. In some jurisdictions such as Victoria, Australia, the disputes between consumer and the water companies are referred to the industrial ombudsman. In England, a specific consumers' representative body is given the authority to investigate consumer claims under the legislation.

In terms of regulatory decision making, the framework is as follows:

¹⁷⁵ See Graham, *Regulating public utilities : a constitutional approach* p.40-41 and Quesada, *Water and Sanitation Services in Europe: Do Legal Frameworks provide for "Good Governance"?* which includes "access to justice" as one component of good governance. See also Hendry, 'An Analytical Framework for Reform of National Water Law' Annex A.2. "Access to Justice and Dispute Resolution", comparing UK, Queensland and South Africa water sectors.

3) Regulatory Decision Making

- a. Licences
 - i. Criteria for approval
 - ii. Licence conditions
 - iii. Obligation to publish
- b. Regulator's internal governance
 - i. Selection and removal
 - ii. Conflict of Interest
- c. Means of Acquiring Information
- d. Regulator's General Disclosure Policy
- e. Investment and Price Determination
- f. Service Level and Customer Service
- g. Non-compliance
- h. Redress

3.3. Utilities Corporate Governance

One of the most important actors in a water project is the utility itself. It is thus not adequate to pay attention only to regulatory institutions and their decision making process. Utilities are typically subjected to some form of corporate rules depending on the form of the entity. These rules may contain important transparency elements.

When the utility is state-owned (Victoria) it is likely to be regulated under a state enterprise law or a specific charter prescribed for the utility. In full divestiture, such as England, the utility may be regulated under normal company law but with some element of its governance contained in its licence conditions. In concessions between a state-owned utility and a private company, such as Jakarta, then one

company is regulated by a state-owned enterprise law and the other falls under normal (private) company law.

The lack of governance in water utilities is illustrated by Tortajada.¹⁷⁶ In the majority of Asian water utilities staff, including senior managers, are often selected because of their political connections, instead of their management abilities or technical skills. Managers often do not have any autonomy to make decisions, and when they do have it is often the case that they lack managerial capability. Water utilities are overstaffed and the positions are often filled due to nepotism or political connections. This poor governance may be reflected in the huge burden of the utilities in paying inefficient employees and lower employee wages compared to normal market rates in the other industries. Eventually this will result in poor water services and higher costs. Aguas Argentina provides another example of lack of corporate governance.¹⁷⁷ Aguas Argentina, the project company, had a low standard of corporate governance. There was a lack of disclosure on internal control mechanisms towards Aguas Argentina under the guise of proprietary and “commercially sensitive” information. It is alleged that the company maintained this for the purpose of safeguarding its position in case renegotiation occurred.¹⁷⁸ This lack of transparency made the project unpopular with civil societies, prompting the government to nationalise the company. Hence, unless developing countries embrace corporate

¹⁷⁶ Tortajada, C., ‘Water management in Singapore’ 22 *International Journal of Water Resources Development* 227

¹⁷⁷ Porporato, M. and Robbins, P.T., ‘Privatisation and corporate governance in emerging economies: What went wrong with Aguas Argentinas SA?’ 2 *International Journal of Economics and Business Research* 187

¹⁷⁸ The company won the bid due to lower price. Later, renegotiation did occur, asking the government to increase tariffs in order to speed up collection rate. *Ibid*

governance, PSP will not be likely to deliver improved performance with accountability.¹⁷⁹

Porporato and Robbins¹⁸⁰ opined that government intervention in water services is justified not only because of the naturally monopolistic character of the industry, but also because of the externalities present. Hence, to them, the question of government involvement in the water services sector exists irrespective of the natural monopoly problem. Should the natural monopoly be reduced and competition introduced, they argued, government would still be involved in regulating the water sector. Both the natural monopoly feature and the presence of negative externalities will shape the feature of corporate governance in water utilities.

The role of transparency in corporate governance in general has been widely acknowledged. The earliest corporate governance guidelines such as the Cadbury Report had pointed out the need for transparency. In the words of the Cadbury Report: “*The lifeblood of markets is information*”. The Cadbury Report considers that barriers to the flow of information are representative of market imperfections and that transparency will contribute to the efficient working of the market economy, prompt boards to take action and allow stakeholders to scrutinise the company.¹⁸¹

¹⁷⁹ Dyck, A., ‘Privatization and corporate governance: Principles, evidence, and future challenges’ 16 The World Bank Research Observer 59

¹⁸⁰ Porporato and Robbins, ‘Privatisation and corporate governance in emerging economies: What went wrong with Aguas Argentinas SA?’

¹⁸¹ ” See Cadbury, A., *Report of the committee on the financial aspects of corporate governance* (Gee Publishing, London 1992)

Other corporate governance guidelines such as the Greenbury Report (1995), Hampel Report (1998), Turnbull Report (1999) and the Paul Myners report (DTI, 1996, HMT, 2001) also highlight the importance of transparency.¹⁸² International organisations have also issued important documents and guidelines such as the OECD series on “Principles on Corporate Governance” and the UNCTAD 2006 on corporate governance disclosure which stresses the importance of transparency.¹⁸³ These frameworks are designed to apply to corporations in general and not specifically to address a regulated natural monopoly.

The UNCTAD defines “Board” as “*the highest governing and monitoring body or bodies of an enterprise on which executive and non-executive or supervisory board members sit*”.¹⁸⁴ Most corporate governance documents recognise the need to disclose the names and composition of the board. Another key point is the disclosure of the board’s role, functions and accountability mechanisms. Such disclosure is necessary for accountability purposes where the board members may be held responsible to the extent of their role and responsibility. When there is clarity on roles

¹⁸² Myners, P., *Report on institutional investment* (HM Treasury, London, 2001) Myners, P., *Developing a Winning Partnership: How Companies and Institutional Investors are Working Together* (1996) Hampel, R., *Committee on Corporate Governance : final report* (Gee 1998) Greenbury, R., *Directors' remuneration: report of a study group chaired by Sir Richard Greenbury* (Gee Publishing 1995) Institute of Chartered Accountants in England and Wales, *Internal control : guidance for directors on the combined code (Turnbull Report)* (Institute of Chartered Accountants in England & Wales 1999)

¹⁸³ OECD, *OECD Principles of Corporate Governance* (2004) <<http://www.oecd.org/dataoecd/32/18/31557724.pdf>> July 01, 2010; UNCTAD, *Guidance on Good Practices in Corporate Governance Disclosure* (2006) <http://www.unctad.org/en/docs/iteteb20063_en.pdf> July 01, 2010

¹⁸⁴ UNCTAD, *Guidance on Good Practices in Corporate Governance Disclosure* p.12

and responsibilities, the accountability mechanism would be much clearer as the accountee would know where and of whom accountability should be asked.

Utilities may need to purchase goods or contract out services from third parties. Unless regulated, utilities may purchase goods and services at a price higher than the market price from an affiliated company. The profit from such purchase then flows down to the utility's shareholders through the parent company. In the end, the investor receives profit at the expense of the utility's consumer. Thus, transparency is required. In theory, transparency of utilities' accounts will provide incentives for consumers and potential providers to track down the possibilities of transfer pricing and any other anti competitive behavior.¹⁸⁵ For regulated monopolies, reporting to regulators must often be based on specific regulatory accounts.¹⁸⁶ Regulatory accounts normally require more specific and industry-focused information by economic regulators for benchmarking, determining prices or allowable rate of return. On the other hand, statutory accounts require more general corporate information.

The UNCTAD guideline recommends that at least the nature, type and elements of the related-party transactions and the decision making process for approving such related-party transactions are disclosed.¹⁸⁷ Normally, procurement between a regulated company and a third party is covered by the regulatory account. There could be a requirement to disclose to the regulator (but not necessarily the

¹⁸⁵ Baldwin, R. and Cave, M., *Understanding regulation: theory, strategy, and practice* (Oxford University Press 1999) p. 308

¹⁸⁶ Inter-Regulatory Working Group, *The role of regulatory accounts in regulated industries, A joint consultation paper by the Directors General of Oftel, Ofgem, Ofwat, Electricity & Gas Supply (Northern Ireland), Rail Regulator and Civil Aviation Authority* (2001)

¹⁸⁷ UNCTAD, *Guidance on Good Practices in Corporate Governance Disclosure* p.6

public) if the utility's trading partners are, in fact, a related party. Usually, there is no prohibition to transact with a related party as long as the procedure to assess that the transaction is entered into at a fair market value is fulfilled. The framework will not discuss the content of the regulatory account in detail. It will analyse the legal mechanisms used in applying and enforcing regulatory accounts and in making financial reports available to the public.

UNCTAD Guidance on Corporate Governance Disclosure considers information on beneficiary ownership structure as vital for informed investment decisions, especially with respect to the equity of shareholders.¹⁸⁸ Disclosure on the top shareholding position is regarded as part of the effort to protect minority shareholders. Specific shareholder's rights which have implications towards company control, such as those related to voting or the appointment of directors should be disclosed. In cases where control of the company is performed through different entities, the UNCTAD guidance promotes the disclosure of the ultimate controller. Echoing the OECD principles, the UNCTAD Guidance also favours the disclosure of ultimate ownership, in addition to disclosure on record ownership. Related to the question of ownership above is 'corporate restructuring' (the change of a company's structure through merger, acquisition, sale of assets or other means for the purpose of improving economic performance). Through restructuring, the liability that carries with the ownership of a company could shift from one party to another. Ownership changes may also impact on the reliability of the investor's commitment to continually invest in water services and to fill the new managerial positions with

¹⁸⁸ Ibid p.8

people having expertise in the field. The nationality of ultimate ownership may also have an implication on how friendly the investor state would be with respect to human rights and corruption issues. There may also be problems related to unemployment and soaring prices as a response of water utility restructuring. The problem of corporate restructuring will become interesting in a regulated environment because the regulator's jurisdiction will only cover the regulated company and not its parent companies. The framework on utilities' corporate governance will comprise of the following:

- 4) Utilities' Corporate Governance
 - a. The Board and its accountability
 - b. Related Party Transaction
 - c. Corporate Restructuring

3.4. Passive Disclosure Rules

Last but not least is the role of “passive disclosure rules”. All of the framework above will analyse how legal frameworks obligate “active disclosure” in institutions involved in water utilities' regulation. This is still incomplete because a comprehensively transparent system requires also a set of passive disclosure rules (see sections 2.5 and 2.6 above).

A passive disclosure rule sets requirements upon public bodies to provide information if requested by any person. Any information is subjected to the rule, unless it falls under the exemption clause. A passive disclosure rule is normally provided by access to information legislation. The existence of an access to information regime alone, however, is not sufficient in guaranteeing transparency as such a regime needs further evaluation. Two crucial elements of a passive disclosure

rule that will be used to evaluate the access to information regime are its applicability to institutions in water services and the exemption clauses, which in turn comprise:

- a. Law Enforcement and Investigation;
- b. Decision Making and Policy Formulation;
- c. Obligation of Confidence; and
- d. Commercial Information.¹⁸⁹

3.5. Chapter Conclusion

The purpose of this chapter is to devise a framework to analyze transparency in a water utilities regulation that would be applied in the three case studies in the subsequent chapters. It consists of five general categories: an overview of the legal and institutional framework, policy in involving the private sector, regulatory decision making utilities corporate governance and passive disclosure rules. The breakdown of the analytical framework that has been discussed in this chapter is in the form of the following:

- 1. Overview of the legal and institutional framework
- 2. Policy in Involving the Private Sector
 - a. Ownership and Regulatory Model
 - b. Procurement
 - c. Publication of Contract
- 3. Regulatory Decision Making

¹⁸⁹ See Fitch, M. and Graham, C., 'The draft Freedom of Information Bill-implications for utilities' 10 Utilities Law Review 257

- a. Licences
 - i. Criteria for approval
 - ii. Licence conditions
 - iii. Obligation to publish
 - b. Regulator's internal governance
 - i. Selection and removal
 - ii. Conflict of Interest
 - c. Means of Acquiring Information
 - d. Regulator's General Disclosure Policy
 - e. Investment
 - f. Price Determination
 - g. Service Levels and Customer Service
 - h. Non-compliance
 - i. Redress
4. Utilities' Corporate Governance
- a. The Board and its accountability
 - b. Related Party Transaction
 - c. Corporate Restructuring
5. Passive Disclosure Rules
- a. Applicability
 - b. Exemptions
 - i. Law Enforcement and Investigation; Decision Making and Policy Formulation
 - ii. Obligation of Confidence, Commercial Information

4. VICTORIA

4.1. Overview of the legal and institutional framework

4.1.1. Federal Regulation and the NWI

The Australian Constitution at Article 100¹⁹⁰ prohibits the Federal government from limiting the powers of the states towards the ‘reasonable use’ of the waters of rivers for conservation or irrigation. Historically, the Constitution does not give the Federal government the powers over environmental matters. However, the Federal government generally has jurisdiction to prescribe legislation over interstate and international trade, corporations, taxations and matters of foreign affairs.¹⁹¹

As a result, water services in Victoria are a combination of complex regulatory arrangements between the Federal and the Victorian (State) government. Major parts of the regulatory framework are enacted by the state under policy guidelines from the Federal government while the rest is federal legislation.

Federal policy guidelines in the water sector came mainly from the Council of Australian Government (CoAG), in the form of the National Water Initiative (NWI).¹⁹² The NWI contains principles of reform of state water laws. The Victorian Government, as a signatory party to the 1994 CoAG reform initiative and the 2004

¹⁹⁰ An Act to constitute the Commonwealth of Australia (taking into account alterations up to Act No. 84 of 1977) Article 100

¹⁹¹ An Act to constitute the Commonwealth of Australia s.51

¹⁹² The Commonwealth of Australia and others, *Intergovernmental Agreement on a National Water Initiative* (2004)

CoAG NWI Intergovernmental Agreement, has enacted the Victorian NWI implementation plan.¹⁹³

The Victorian NWI implementation plan contains measures which are relevant to water utilities' reforms, among others, reforms in urban water governance in the form of upper bound pricing, development of pricing policies for recycled water/storm water, and for rural and regional water services in the form of review and development of pricing policies for trade wastes.¹⁹⁴ Benchmarking efforts are also carried out under the Victorian NWI implementation plan, also including new investment, refurbishment of infrastructure and the setting up of independent pricing bodies for water storage and delivery. Some of these plans are underway and some have already been completed.

4.1.2. Victorian Water businesses

Victoria's water industry comprises (i) Melbourne Water Corporation responsible for the collection, storage and supply of bulk water, (ii) three retail water services companies supplying the metropolitan Melbourne area: City West Water, South East Water, Yarra Valley Water ("The Three Retailers") (iii) 15 regional-urban water authorities (RUWA) and (iv) five rural water authorities (RWAs) responsible for approving water trade and transfer of water shares.

¹⁹³ The Commonwealth of Australia and others, *The Council of Australian Governments' Water Reform Framework* (1994) ; The Commonwealth of Australia and others, *Intergovernmental Agreement on a National Water Initiative*; Government of Victoria, *Victoria's NWI Implementation Plan* (2006)

¹⁹⁴ Government of Victoria, *Victoria's NWI Implementation Plan*

The following **Table 1** lists regulated water businesses in Victoria.

Corporation	Function/Area	Legal basis of incorporation
Melbourne Water (also serves as RWA)	Bulk water and bulk sewerage service in Melbourne as well as the management of rivers, creeks and major drainage system in Port Philip and Westernport.	Water Act 1989 (Vic) and Water (Governance) Act of 2006 (Vic)
Gippsland and Southern Rural Water (RWA)	Domestic, irrigation and stock and bulk water supply in regional Victoria	
Goulburn Murray Rural Water (RWA)		
Grampians Wimmera Mallee Water (RWA)	Water, sewerage, irrigation and domestic and stock services	
Lower Murray Urban and Rural Water (RWA)		
Barwon Water	Water and sewerage services in regional Victoria	
Central Highlands Water		
Coliban Water (RWA)		
East Gippsland Water		
Gippsland Water		
Goulburn Valley Water		
North East Water		
South Gippsland Water		
Western Water,		
Westernport Water		
Wannon Region		

Water Authority		
City West Water Ltd	Retail water supply and sewerage services in Melbourne metropolitan area	Corporations Act 2001 (Cth), SOE Act 1992 (Vic)
South East Water Ltd		
Yarra Valley Water Ltd		

Sixteen of the water corporations are established through the Water Act 1989¹⁹⁵ while the remaining three were set up under the (Commonwealth) Corporations Act 2001¹⁹⁶ in conjunction with the State Owned Enterprise Act 1992 (SOE Act)¹⁹⁷. The Three Retailers (City West Water, South East Water and Yarra Valley Water) are State Owned Companies under the SOE Act. Unlike other ordinary corporations under the 2001 Corporations Act, their status as State Owned Companies means that their constitutions are already prescribed by the SOE Act and any deviation from this prescription must obtain the approval of the Treasurer.¹⁹⁸ Although for-profit companies, The Three Retailers can be subjected to non-commercial activities by the Victorian Government but these are subject to mutual agreement between each of the companies and the government, which then allows the government to reimburse its non commercial activities.¹⁹⁹

As discussed in Section 1.4.1 (Water Services), the analytical framework for this PhD research will be applicable to highly networked water utilities which are

¹⁹⁵ Water Act 1989 No. 80 of 1989

¹⁹⁶ Corporations Act 2001

¹⁹⁷ State Owned Enterprises Act 1992 (Victoria), No. 90 of 1992, Version No. 036

¹⁹⁸ Mandatory model of Articles of Association of a Victorian SOE is prescribed in the Schedule 1 *ibid*

¹⁹⁹ *Ibid*, s.72 also Financial Management Act 1994 No. 18 of 1994 (Victoria), Version No. 061 Part 2

separate legal entities from the state. As such, only the governance systems of The Three Retailers and Melbourne Water are evaluated and the other regional-urban water utilities which supply water to towns and rural areas are excluded.

The research will also assess the governance framework for private sector participation between the Victorian Government, Melbourne Water and a private entity called Aquasure, a consortium comprising of Thiess, Degremont (a subsidiary of SUEZ) and Macquarie Capital to build a water desalination plant in Wonthaggi. The 30-year long 3.5 billion USD build-operate-transfer desalination contract is financed both through debt and equity.²⁰⁰ There were controversies surrounding the project as to the actual sum of money paid each year to Aquasure, irrespective of water sold,²⁰¹ and the confidentiality of the contract provisions.²⁰²

4.1.3. Sectoral rules and regulatory institutions applicable to Victorian water businesses

²⁰⁰ 'Public Private Partnership' (*Government of Victoria*,) <<http://www.ourwater.vic.gov.au/programs/desalination/about-us/ppp>> accessed November 24, 2010 p.2

²⁰¹ "The government has steadfastly refused to disclose the level of the water security payment. Back-of-the-envelope estimates by both The Age and The Australian Financial Review indicate annual payments of at least 300 million USD for the luxury of having the plant." Schneiders, B. and Millar, R., 'Brumby's giant money pit' <<http://www.theage.com.au/victoria/brumbys-giant-money-pit-20100827-13w2n.html>> accessed November 24, 2010

²⁰² "Nationals Leader Peter Ryan repeated his call for the government to release the full desalination plant contract. He said Mr Brumby should reveal the cost of the water security payment, which is an annual sum paid to Aquasure to keep the plant in a condition capable of delivering water at any time, even if none was ordered." AP, 'Govt's desal figure misleading: Brumby' (November 24, 2010) <<http://news.smh.com.au/breaking-news-national/govts-desal-figure-misleading-brumby-20100917-15ewb.html>> accessed August 5, 2011

The legislative framework for the metropolitan water sector is comprised of a number of Acts, most of which are Victorian (Table 1) but relevant Commonwealth Acts include the Trade Practices Act 1974²⁰³ and the Corporations Act 2001.²⁰⁴ The most significant Victorian Acts are the Water Act 1989²⁰⁵ (and the Water Industry Act 1994 (WIA)).²⁰⁶

Water services in Victoria are regulated primarily by six main institutions explained below. In some instances, the regulating powers of these institutions overlap.

4.1.3.1. Minister for Water

For the regional-urban water businesses, rural water businesses and Melbourne Water, the Minister for Water requests reports and information, creates policy, issues directions and sets standards and obligation.²⁰⁷

The Three Retailers do not report directly to the Minister for Water as they are set up under the Corporations Act 2001. The Treasurer is responsible for their supervision and monitoring.²⁰⁸ However, the Minister for Water is also tasked by the

²⁰³ Trade Practices Act 1974, Act No. 51 of 1974 as amended

²⁰⁴ Corporations Act 2001

²⁰⁵ Water Act 1989 No. 80 of 1989, Version 102

²⁰⁶ Water Industry Act 1994 No. 121 of 1994, Version No. 063

²⁰⁷ Department of Sustainability & Environment Government of Victoria, *A Governance Guide to the Victorian Water Industry* (Victorian Government)
<http://www.ourwater.vic.gov.au/__data/assets/pdf_file/0006/54555/Governance-Guide-update4a.pdf>
November 24, 2010

²⁰⁸ State Owned Enterprises Act 1992 (Vic) ss 19, 24, 26, 41-43, 45-55

WIA with issuing water supply and sewerage licences and Statements of Obligation to The Three Retailers.²⁰⁹

Licences issued by the Minister of Water can be in the form of a water licence, a water and sewerage licence, a drainage licence, a sewage treatment licence or a water headworks licence.²¹⁰ The Three Retailers each hold a licence for water and sewerage. The licence document contains the term of a licence, the area of operation, licence charge, obligation to enter into a dispute resolution scheme with the ombudsman, security deposit and ring-fencing of the utility company to engage in water-only businesses.²¹¹

In addition to licences, The Three Retailers must comply with a “Statement of Obligation” (SOO). The Minister of Water has the power to make, issue, amend, vary or revoke an SOO, after consulting with the Essential Services Commission (ESC) and the Treasurer.²¹² The WIA 1994 does not limit the scope of regulation through the SOO, thus, the Minister can virtually regulate anything²¹³ as long as it is not in contravention of higher laws. To date the Minister has issued two types of Statement of Obligation applicable to water businesses. The 2007 SOO obligates the retailers to prepare and deliver a *Water Plan* for the ESC to determine prices; clarify governance and risk management, board performance, customer and community engagement,

²⁰⁹ Water Industry Act 1994 No. 121 of 1994, Version No. 063 s.4I and s.8

²¹⁰ Ibid s.5 (1)

²¹¹ Government of Victoria, *Water and Sewerage Licence, Yarra Valey Water Limited A.B.N. 93 066 902 501, Reprinted incorporating amendments as at 28 July 2004* (2004) Government of Victoria, *Water and Sewerage Licence, City West Water Limited A.B.N. 70 066 902 467, Reprinted incorporating amendments as at 28 July 2004* (2004)

²¹² Water Industry Act 1994 No. 121 of 1994, Version No. 063 s.4I

²¹³ Ibid s. 4I (2) and (3)

consultation with other authorities, response to incidents and assets management; planning and service delivery, environmental management, payment schemes and contributions.²¹⁴ In 2009, the Minister of Water issued an additional Statement of Obligation (System Management) to The Three Retailers to regulate bulk water entitlements from Melbourne Water to The Three Retailers.²¹⁵

4.1.3.2. Essential Services Commission

The Essential Services Commission (ESC) regulates performance assessment (through benchmarking) and pricing. ESC is a multi utility regulator enacted through the Essential Services Commission Act of 2004 (“ESC Act”).²¹⁶ The ESC is considered an ‘independent pricing body’ as required by the Victorian NWI implementation plan.²¹⁷ The ESC is tasked with determining prices,²¹⁸ standards and conditions of service²¹⁹ and issuing regulatory codes²²⁰. It also has the power to require the regulated industries to submit information for regulatory purposes.²²¹

Another instrument which prescribes the power of the ESC is the Water Industry Regulatory Order (WIRO).²²² The WIRO is an Order issued by the Governor

²¹⁴ See *Water Industry Act 1994, Statement of Obligation, City West Water Limited* (2008) <http://www.water.vic.gov.au/__data/assets/pdf_file/0013/12811/CWW-SOO-Consolidated-v.-oct-08.pdf> January 3, 2011

²¹⁵ See *Water Industry Act 1994, Statement of Obligation, City West Water Limited (Systems Management)*

²¹⁶ Essential Services Commission Act 2001 No. 62 of 2001

²¹⁷ Government of Victoria, *Victoria's NWI Implementation Plan*

²¹⁸ Essential Services Commission Act 2001 (Vic), s.33

²¹⁹ Water Industry Act 1994 No. 121 of 1994, Version No. 063 s.4.e

²²⁰ Ibid , s.4.f

²²¹ Ibid , s.4.g

²²² Water Industry Act 1994, Water Industry Regulatory Order 2003

by virtue of the WIA and the ESC Act. The WIRO itself is a single document (which is amended from time to time) and governs all business entities regulated by the ESC.

The WIRO and the WIA also empowers the ESC to enact Codes.²²³ In practice, these Codes contain important details of the ESC operation. Regulatory accounts and customer service have a legal basis under these Codes. The ESC has issued several regulatory accounting codes, customer services codes and two guidelines, one on new network connections and the other for approving, conducting and reporting audits.

4.1.3.3. Energy and Water Ombudsman

Disputes between water businesses and consumers are referred to the Energy and Water Ombudsman (EWOV). The EWOV is a company limited by guarantee (and not having share capital) set up under the 2001 Corporation Act.²²⁴ Water businesses are obliged to enter into an agreement with EWOV to settle their disputes with customers. According to the EWOV Charter²²⁵, its jurisdiction does not extend to complaints relating to tariff setting or determination of price structures, presumably because this has been reserved for the ESC.²²⁶ Government policies are also excluded

²²³ Water Industry Act 1994 No. 121 of 1994, Version No. 063 s.4F also Water Industry Regulatory Order (WIRO) ss 14-15

²²⁴ Energy and Water Ombudsman Victoria, *Constitution of Energy and Water Ombudsman (Victoria) Limited* <http://www.ewov.com.au/site/documents/EWOV-Constitution_17May2010.pdf> November 24, 2010

²²⁵ Energy and Water Ombudsman Victoria, *Energy and Water Ombudsman Charter 30 May 2006* (2006)

<<http://www.ewov.com.au/site/DefaultSite/filesystem/documents/PDF/Charter%2030%20May%202006.pdf>> November 24, 2010

²²⁶ Ibid para.4 (Jurisdiction)

from EWOV's jurisdiction as well as those cases that are being referred to tribunals or the courts and any matters that are specifically stipulated by legislation. The same applies for 'events beyond reasonable control of the participants',²²⁷ as the remedies for such a *force majeure* are set out in legislation and its enforcement is subjected to judiciary bodies.

Finally, the jurisdiction of EWOV does not cover actions undertaken by the utilities in ensuring the security of water supply by virtue of administrative or regulatory power.²²⁸ This exclusion is typical in the redress mechanism in water utilities as the question of policy and economic regulation is reserved by the executive (Minister of Water) and the economic regulator (ESC). EWOV is intended to deal only with the day-to-day operation of a regulated business and not with large scale cases affecting the sustainability of a water supply system such as those related to a *force majeure*.

4.1.3.4. Other departments

Water businesses in Victoria are regulated by several other departments. The Treasurer of the Department of Treasury and Finance regulates financial management of the water businesses while drinking water standards are regulated by the Secretary to the Department of Health. Activities related to waste water discharges and other environmental protection issues are carried out by the Environment Protection Authority (EPA).

²²⁷ Ibid para 4.1 (g)

²²⁸ Ibid para 4.2 (h)

4.1.3.5. General administrative, corporate and economic rules applicable to Victorian water businesses

Water businesses in Victoria are also covered by general administrative and corporate rules in addition to the sectoral rules as discussed above. The Three Retailers are private companies fully owned by the Victorian Government under The Corporations Act 2001.²²⁹ This Act does not apply to the other 16 government-owned corporations.

The Audit Act 1994²³⁰ establishes the power of the Victorian Auditor General to commence audit against government departments or government-owned corporations, at their request and expense. The Public Administration Act 2004²³¹ is also applicable to the water companies, by virtue of the Water Governance Act 2006.²³² The Australian Competition and Consumer Commission (ACCC) has enforcement jurisdiction over Water Market Rules 2009 and the Water Charge (Termination Fees) Rules 2009 by virtue of the Water Act 2007 (Cth).²³³ The jurisdiction of the ACCC under the Water Act 2007 does not extend into Victorian urban water supplies. However, the ACCC has jurisdiction over the competitive parts of Victorian water businesses under the Trade Practices Act 1974 (Cth).²³⁴ Victoria

²²⁹ Corporations Act 2001

²³⁰ Audit Act 1994, No. 2 of 1994 (Victoria), Version No. 051

²³¹ Public Administration Act (Victoria) 2004 No. 108 of 2004 Version No. 024

²³² Water (Governance) Act 2006 Act No. 85/2006

²³³ Water Act 2007, Act No. 137 of 2007 also Water Market Rules 2009 - F2009L02424 Water Charge (Termination Fees) Rules 2009 - F2009L02425

²³⁴ Trade Practices Act 1974 (Vic)

also has a Freedom of Information Law 1982 which is applicable to certain government-owned corporations and regulatory institutions.²³⁵

²³⁵ Freedom of Information Act 1982

Table 2: Recapitulation of primary regulatory institutions overseeing Victorian Water Businesses

Area	Institutions	Primary Legal Basis	Regulatory Outputs
General policy/direction and licensing	Minister of Water; Department of Sustainability and Environment	Water Industry Act 1994 (Vic)	Operational licences for The Three Retailers, Statement of Obligation
Financial management	Treasurer at the Department of Treasury	Financial Management Act 1994 (Vic)	Financial reporting guidelines. Review of annual reports, corporate plans and business
Drinking Water	Secretary at the Department of Health	Safe Drinking Water Act 2003 (Vic)	Drinking Water Standard
Pricing and monitoring of performance	Essential Services Commission	Essential Services Commission Act 2001 (Vic), Water Industry Act 1994 (Vic)	Price determinations (S. 33 of ESC Act). Standards and conditions of service (S.4E of WIA). Codes (in relation to its functions and powers (S.4F of the WIA). Information requirement from regulated businesses (S 4G of the WIA). Water Industry Regulatory Order (WIRO).
Environmental protection, waste water discharges	Environment Protection Authority	Environment Protection Act 1970 (Vic)	Waste water licence

Consumer dispute	Energy and Water Ombudsman	Direct (not applicable to The Three Retailers): Water Act 1989 (Vic) Through licences (for The Three Retailers): Water Industry Act 1994 (Vic), Essential Services Commission Act 2001 (Vic)	Binding decision
Freedom of Information	Victorian Ombudsman, Victorian Civil & Administrative Tribunal (VCAT)	Freedom of Information Act 1982 (Vic)	Recommendation (from Ombudsman) Decision (From VCAT)
Competition (Federal Jurisdiction)	Australian Competition and Consumer Commission	Trade Practices Act 1974, Water Act 2007 (Cth)	Decision

4.2. Policy in involving the private sector

4.2.1. Determination of ownership and regulatory model

The questions of ownership and the regulatory model for water utility in Commonwealth Australia are reserved for the state.²³⁶ The status of Victorian water services as “publicly owned” is entrenched in Victoria’s State Constitution when an amendment was introduced in 2003.²³⁷ Article 97 of the Victoria Constitution states: *“If at any time on or after the commencement of section 5 of the Constitution (Water Authorities) Act 2003 a public authority has responsibility for ensuring the delivery of a water service, that or another public authority must continue to have that responsibility”* and that it must *“be accountable to a responsible Minister of the Crown for ensuring the delivery of that service”*.²³⁸ This provision can only be modified when the special majority requirement is fulfilled which requires the approval of approximately three fifths of parliament members.²³⁹

The Act clarifies that a “Public Authority” can mean a statutory authority, a council, a company whose shares are held by or on behalf of the state or an agency head.²⁴⁰ The utilities can thus be in the form of a statutory corporation or an ordinary company established under the Corporations Act as The Three Retailers are today.

²³⁶ Commonwealth of Australia Constitution Act Article 100

²³⁷ Constitution (Water Authorities) Act 2003 Act No. 37 of 2003 The Act clarifies that a Public Authority can mean a statutory authority, a council, a company whose shares are held by or on behalf of the state or an agency head and that the scope of water services spans from supply, sewerage, irrigation, collection and storage to sewage treatment.

²³⁸ Constitution Act 1975, No. 8750 of 1975, Version No. 196 s.97 (1) (2)

²³⁹ Ibid s.18(2)(h)

²⁴⁰ Ibid s.96 (a)-(d)

Within the public ownership spectrum, there are still debates as to the most efficient form of entities, as each form entails its own costs and benefits. If utilities are in the form of a statutory corporation, the Parliament can have more influence on the corporate governance including, for example, in determining the composition of the board of directors and how they should be appointed. This is not the case with respect to publicly owned companies established under the Corporations Act.

A second disadvantage of the Corporations Act is the executive's relative lack of influence in providing direction to the company. The executive has the power to issue direction to utilities but this process is perceived to be less transparent if compared to what happens in a statutory corporation.²⁴¹ At the moment, the "Statement of Obligation" (SOO) and the Water Plan provide most guidelines, but the executive has no legislative powers beyond that.²⁴²

The other disadvantage lies in the difficulties of reconciling commercial with non-commercial objectives.²⁴³ In Victoria, this is currently balanced through the SOO and the WIRO, but both instruments have been perceived as inadequate as far as protecting vulnerable groups and the environment because the duties are imposed on regulators and not directly upon utilities.²⁴⁴

²⁴¹ Victorian Competition and Efficiency Commission, *Water Ways: Inquiry into Reform of the Metropolitan Retail Water Sector, Final Report February 2008* (2008) p 163

²⁴² Ibid p.164

²⁴³ Some jurisdictions, such as England, provide a non profit company limited by guarantee model of corporation. This has been used for Yorkshire Water. However, such a model requires full divestiture which is not compatible with the current constitution.

²⁴⁴ Victorian Competition and Efficiency Commission, *Water Ways: Inquiry into Reform of the Metropolitan Retail Water Sector, Final Report February 2008* p.164

Having said that public ownership is entrenched, the Constitution never prohibits private sector participation. The Constitution does not prohibit arrangements with another body, including an independent contractor, for the provision of water services so long as the public authority retains the responsibility and remains accountable to the Minister.²⁴⁵ Meanwhile, restructuring of water services is allowed as long as they remain accountable to the Minister.²⁴⁶

It is clear from the above that the Victorian Government can contract out its water services, however, there may be an extent to which the law limits this power.

The Victorian Constitution provides no clarity as to the degree of private sector participation allowed by it under section 97 (3).²⁴⁷ In cases of affermage or concession, for example, public authorities retain ownership of the assets and remain accountable to ministers, however, as will be discussed in Chapter 5 (Jakarta), the private sector will have a considerable degree of control over the services whereas, on

²⁴⁵ Constitution Act 1975, No. 8750 of 1975, Version No. 196 s. 97 (4). See also para (3) “*Nothing in this section prevents a public authority that has responsibility for ensuring the delivery of a water service entering into an arrangement of any kind with a person or body (including an independent contractor) relating to the delivery of that service while itself retaining that responsibility and remaining accountable to a responsible Minister of the Crown for ensuring the delivery of that service*”

²⁴⁶ Ibid s. 97 (4) “*Nothing in this section prevents the making of an alteration to the structure, composition or membership of a public authority that has responsibility for ensuring the delivery of a water service if the alteration does not affect its status or the status of a successor body as a public authority accountable to a responsible Minister of the Crown for ensuring the delivery of that service*”.

²⁴⁷ Ibid s. 97 (3) “*Nothing in this section prevents a public authority that has responsibility for ensuring the delivery of a water service entering into an arrangement of any kind with a person or body (including an independent contractor) relating to the delivery of that service while itself retaining that responsibility and remaining accountable to a responsible Minister of the Crown for ensuring the delivery of that service.*”

the other hand, the state's powers in regulating the sector diminishes due to the contractual nature of the relationship.

In the Australian Commonwealth, the source of power to contract government services can come directly from executive's prerogative, statutory authority or through the common law.²⁴⁸ The power to contract government services through the executive's prerogative is deemed to be vested in the Commonwealth's Constitution.²⁴⁹ Alternatively, a statute can also confer to the executive that it has the power to enter into a contract with private parties. When this is the case, the statute may provide limitation to government on the subject on which they can contract with the private sector. Lastly, the power to contract can come from the common law. In this case, the government is perceived as an embodiment of the Crown. The Crown, like an ordinary legal person, is deemed to have the ability to enter into a contract with another party.²⁵⁰

According to Seddon, for the Commonwealth government, its power to contract is limited by Constitutional provisions and several legislations. However, that is not the case for states such as Victoria. In Victoria and the other states, the source of power to contract stems mainly from the prerogative rights.²⁵¹ Therefore, as Seddon concludes, for State governments, there is nothing that prevents them from entering

²⁴⁸ Seddon, N., *Government Contracts: federal, state and local* (4th edn, Federation Pr 2009)p 55-86

²⁴⁹ Ibid

²⁵⁰ Ibid

²⁵¹ "As we have seen, the commonwealth power is limited by Constitution that contains specific, enumerated power. By contracts, states and territories have no enumerated legislative powers so that, apart from their place in the federation, there should be no limit on their executive powers to enter into contract.s" Ibid p. 77

into contracts with private parties.²⁵² This also follows that they can contract out any kind of services they deem appropriate.

As nothing in the Constitution and prevailing laws can prevent the government from entering into a contract for the provision of water services with third parties, public scrutiny relies mostly through ordinary procurement rules.²⁵³ Public law values are still applicable albeit with some difficulties. The following sections will evaluate how transparency, which is recognised as one of the cornerstones of public law values,²⁵⁴ is reflected in water contracts in Victoria. The Wonthaggi desalination project between the Victoria Government and Aquasure, a consortium comprising Thiess, Degremont (a Suez Environnement company) and Macquarie Capital, will be used as an example.

4.2.2. Procurements

4.2.2.1. Procurement Committees

Disclosure of Conflict of Interest (CoI)²⁵⁵ under the Victoria Government Purchasing Board Guideline²⁵⁶ and the Victorian Public Service Code of Conduct is

²⁵² Ibid

²⁵³ The guideline and policy framework for PPPs in the whole of Australia is issued by Infrastructure Australia – a federal advisory body established by Infrastructure Australia Act 2008 No. 17, 2008. Australian states may issue specific guidelines based on this national guideline Department of Treasury & Finance (Victoria), *National PPP Guidelines, Partnerships Victoria Requirements* (2010) . Portfolio ministers are responsible for PPP projects in Victoria

²⁵⁴ For transparency as one of the public law values see, for example, Freeman, J., 'Extending Public Law Norms Through Privatization' 116 Harvard Law Review 1285

²⁵⁵ Public Administration Act (Victoria) 2004 s.7(1): *Public officials should demonstrate integrity by (b)(iv)avoiding any real or apparent conflicts of interest*

made internally to the superiors of the public officials. CoI disclosure on these guidelines is not directed to the public or tender participants.²⁵⁷

4.2.2.2. Tender Processes

The Australian National PPP guideline²⁵⁸ mentions four phases in the PPP project cycle. These are: (i) the release of Expression of Interest (EoI), (ii) the release of Request for Proposal (RFP), (iii) selection of preferred bidder; and (iv) the execution of the contract. In each of these stages a decision – requiring government approval – is made. The National PPP guideline acknowledges the importance of considering public interest matters such as, access, accountability and consumers’ rights, both in the project planning and development stages.²⁵⁹ There is emphasis on transparency in every stage of the project cycle. “*Full disclosure should be the default position of a PPP contract with the private sector.*”²⁶⁰

While the majority of the provisions in the guideline regulate the relationship between government and the private sector, it acknowledges that proper management of PPP contracts would require “*ensuring appropriate governance, probity and compliance practices*” within the government, and in the relationship between the

²⁵⁶ Government of Victoria (Strategy and Policy Government Services Group Department of Treasury and Finance), *Good Practice Guidelines, Conduct of Commercial Engagements* (July 2011) Annex A

²⁵⁷ Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners’ Guide* (2011) Appendix C (Conflict of Interest on Public Officials); Office of Public Employment, *Code of Conduct for the Victorian public sector* (Government of Victoria 1995) sections 34-42

²⁵⁸ Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners’ Guide*

²⁵⁹ Ibid para 3.4.3

²⁶⁰ Ibid para 6.5.3 *General Disclosure Principle*. The exceptions are cases involving trade secrets, ‘genuine’ commercial confidentiality and materials which, if disclosed, will harm the public interest

government and “any other government stakeholders”.²⁶¹ There is no emphasis in managing good relations with end users of the PPP project, which is the public themselves, however, this is much better than Indonesian procurement framework that we will discuss later in Chapter 5.

Victorian Government requires all procurement to be assessed in terms of its “Public Interest” at every stage. The assessment covers the project’s effectiveness, accountability and transparency, affected individuals and communities, consumer rights, public access, security and privacy.²⁶²

However, the template issued by the Victorian Government in assessing transparency and accountability is not so useful, as it only requires public bodies to ‘identify’ government policies which require transparency and accountability in all stages of the procurement (bidding, negotiation, contract execution) as well as any applicable disclosure requirement under legislations or similar contracts.²⁶³ On the other hand, the PPP Guideline issued by the Commonwealth Government (also applicable to Victoria) is rather useful as it recognises government’s accountability “risk”, and prescribes that the assessment factors should cover the scrutiny by the auditor-general, ministerial accountability to the parliament and the availability of administrative law remedies.²⁶⁴

²⁶¹ Ibid para H.7.5 p. 133

²⁶² Department of Treasury & Finance (Victoria), *Partnerships Victoria Requirements, Annexure 7, Public Interest* (2009)

²⁶³ Ibid p.5

²⁶⁴ Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners’ Guide* appendix H.7.5 p 133-134

Below, are the stages of procurement in Victoria.

4.2.2.2.1. **Expression of Interest (EoI)**

According to the National PPP Guideline, in order to ensure transparency, release of EoI should be advertised publicly or made through a procurement website.²⁶⁵ (In Victoria, this is done through the Tenders Victoria website).²⁶⁶ EoI responses from the private sectors will then be evaluated. The National PPP Guideline contains criteria and methodology of EoI evaluation. Based on the evaluation, bidders will be shortlisted. Failed EoI respondents – according to the guideline – can be debriefed so that they may learn from their experience. Details concerning EoI evaluation will not be released after the process is closed.

4.2.2.2.2. **Request for Proposal (RFP)**

After bidders are shortlisted, the next step is the RFP stage. In this stage, the government formally requests selected bidders to make a proposal for the bid, and the bidders will incur some costs to prepare their proposal. Although there is no guarantee that the project will continue, this stage already reflects the seriousness and government's commitment.

²⁶⁵ Ibid para 4.3

²⁶⁶ Department of Treasury & Finance (Victoria), National PPP Guidelines, Partnerships Victoria Requirements (2010) para 13 'Tenders Vic, Victorian Government Tenders System' (*Government of Victoria*, 2012) <<https://www.tenders.vic.gov.au>> accessed January 3, 2012

The RFP document should already contain a draft project agreement and payment mechanisms.²⁶⁷ The contracts may consist of the project or concession agreement; services specifications; financing agreement, agreement with builders and operational service providers; and security documents providing government with rights over the project's assets. There is no mention on the National Guideline that this document can be subjected to public disclosure at this stage.

Information supplied by individual bidders is treated with special care. Interaction and discussion on RFPs between shortlisted bidders and the procurement team are commenced individually to preserve intellectual property.²⁶⁸ The procurement team must also take reasonable steps to prevent information from certain bidders accidentally being conveyed to another.

Evaluation of the RFP submission will have to be undertaken transparently with the methodology clearly stipulated. The National PPP Guideline advocates the use of a Public Sector Comparator²⁶⁹ as a method to quantitatively assess the RFPs, however, a Public Sector Comparator is not the only determining factor. The Guideline also highlights that some qualitative factors need to be properly weighed. The Evaluation report should be made in detail comprising views of different²⁷⁰ panel or sub panel members of the project team and directed to the project steering committee. The bids should be ranked from most attractive to least attractive.

²⁶⁷ Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide* Chapter 5.1. see also p.22

²⁶⁸ Ibid p.25

²⁶⁹ Australian Government, *National Public Private Partnership Guidelines Volume 4: Public Sector Comparator Guidance* (2011)

²⁷⁰ For example, design, finance, service delivery

4.2.2.2.3. **Selections of preferred bidder**

Based on the RFP evaluation report, a single bidder should be selected. In the event that the committee fail to select a single bidder then the shortlisting of two bidders, undertaking of a “Best and Final Offer” or the use of ‘structured negotiation’ can be envisaged.²⁷¹ Before undertaking any of these options, government approval would be required.

The next step, negotiation, is led by a project director.²⁷² As RFP documents already contain draft agreements, the National Guideline makes it clear that negotiation must be constrained into issues which depart from the RFP. It is recommended that drafting is tightly controlled by legal advisors and the procurement teams and that agreed items should be recorded. The project team should then report back to the Government on the results of the negotiation. Only when the government approves will the project continue to the execution of contracts.

4.2.2.2.4. **Execution of the contract**

The final stage is execution of contract, attended by public officials signing the contract document. The Guideline mentions that it is ‘good practice’ that following the execution of contract, losing bidders are invited to discuss their bids.

²⁷¹ Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners’ Guide* p.26-27

²⁷² Ibid p.29

However, information supplied by losing bidders is not likely to be disclosed to the public.

A review of the whole procurement process may be undertaken by the Auditor General and the results of such a review would be in the public domain. According to the guideline:

²⁷³ *“As a general principle, this requirement for visibility and accountability means that full disclosure should be the default position for a PPP contract with the private sector, except for consideration of voluntary disclosure of the following: trade secrets; genuinely confidential business information; and material which, if disclosed, would seriously harm the public interest.”* (emphasis by author).

From the above paragraph, it would appear that disclosure is intended only after the final stage of the procurement process – after the execution of contract and closing is achieved. The guideline stresses that *“Confidentiality is particularly important during the bid stage where bidders supply confidential and sensitive commercial information”*²⁷⁴ and that the disclosure of cost structures would compromise the competitive bidding process while at the same time acknowledging that transparency *“of the bid process is paramount to give bidders certainty and to meet public procurement probity requirements”*.²⁷⁵

²⁷³ Government of Victoria, 'National Public Private Partnership Guidelines Volume 2: Practitioners' Guide' 2008) N.35 above at p.32

²⁷⁴ Ibid. *“While government is committed to a policy of openness and transparency, a strong measure of confidentiality may be required during the procurement process”* Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide* para 13.4 p.66

²⁷⁵ Ibid

An innovative approach by the Guideline is the requirement for government to ensure that information on project performance²⁷⁶ is available for release after the contract is executed. In order for it to happen, the guideline mentions that private parties should acknowledge that disclosure by government by operation of the FoI Act will not amount to a breach of confidentiality.²⁷⁷

This requirement must be incorporated in the contract during the drafting period. The guideline contains no clue as to how this is applied in practice. Presumably, this could be made operational through insertion of a waiver clause side-by-side with the standard confidentiality clause, which will apply when disclosure under FoI is made. However, a confidentiality obligation does not only arise from a contract, it can also arise from general common law, in which event the waiver clause would not be able to derogate.

The Wonthaggi Desalination Contract²⁷⁸ contains a general confidentiality clause which binds all the companies and individuals (the contractor, guarantor, reviewer and auditor, including Melbourne Water but not the State) from disclosing the contract and any document and information resulting from its activity. Through

²⁷⁶ Accountability for performance is only a part of other sets of accountability features in a democratic government. The other types of accountability are accountability for finances and accountability for fairness. See Behn, R.D., *Rethinking democratic accountability* (Brookings Inst Pr 2001)

²⁷⁷ Australian Government, *National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide* para 6.5.3.

²⁷⁸ Article 14.1 of the D&C Direct Deed: *D&C Contractor, the D&C Guarantor and the Independent Reviewer & Environmental Auditor must keep the contents of this deed and all documents and information made available to it under, or in connection with, or in the course of the performance of, this deed or any other Project Document, confidential and must not disclose the same to any other person without the prior written consent of the other party.* The Minister for Water of the State of Victoria and others, *Victorian Desalination Project D&C Direct Deed* (2009)

these general terms, the contract bars the parties from disclosing any of the project information to anyone, including to the government or regulator. However, this general confidentiality clause is limited by several exceptions.

The exceptions include: (i) disclosure required by Law or legally binding Approval²⁷⁹, (ii) public disclosure by the state, its ministries or agencies under the Freedom of Information Act 1982 (Vic), the Ombudsman Act 1973 (Vic) or to satisfy the requirements of the Victorian Auditor General or the Government policy concerning Partnerships Victoria, for the purpose of Parliamentary accountability; and for Ministers to fulfil his or her duties of office, (iii) Publication and disclosure by the state, or that which relates to the project performance except if the parties (in this case the D&C Contractor, the D&C Guarantor and the Independent Reviewer & Environmental Auditor and the Project Co) considers – and the state agrees – that such information is confidential. The D&C contract also bars some of the parties – but not the State –from voluntary disclosure.²⁸⁰

Hence, in the D&C Wonthaggi Desalination Contract, disclosure under the FoI, the Ombudsman Act and for the purpose of parliamentary accountability are

²⁷⁹ 14.2 Exceptions to confidentiality. Clause 14.1 will not apply in the following circumstances: (a) any disclosure required by Law or legally binding Approval. See *ibid*

²⁸⁰ Article 14.4.c.1 of the D&C Direct Deed: *Each of Project Co, the D&C Contractor, the D&C Guarantor and the Independent Reviewer & Environmental Auditor must not, and must ensure that its Associates do not, make any public disclosures, announcements or statements in relation to the Project or the State's or the State's Associates' involvement in the Project without the State's prior consent and, if such disclosure, announcement or statement is required under clause 14.2, such consent will not be unreasonably withheld; ibid*

enabled. However, “active” disclosure under the initiative of the parties other than the State (such as Suez and their guarantor) may not be imparted.

4.2.3. Publication of contracts

On October 2000, the Bracks’ Labor government issued a transparency policy which includes the requirement to disclose Victorian government contracts to the public domain.²⁸¹ Contracts worth more than 100,000 USD in value must disclose its full title and contracts over 10 million USD should be published on the internet in a full and readily accessible format.²⁸² This internet publication scheme is administered by the Victoria Government Purchasing Board (VGPB).

In 2005, the Victorian Department of Treasury and Finance issued directive FRD 12A²⁸³ “Disclosure of Major Contracts”. The directive refers to Bracks’ policy statement²⁸⁴ and the implementation guideline.²⁸⁵ Disclosure requirements are

²⁸¹ Bracks, S., *Ensuring Openness and Probity in Victorian Government Contracts, A Policy Statement* (2010)

<[http://www.growingvictoria.vic.gov.au/CA256D800027B102/Lookup/EnsuringProbityPolicy/\\$file/Open_pro.pdf](http://www.growingvictoria.vic.gov.au/CA256D800027B102/Lookup/EnsuringProbityPolicy/$file/Open_pro.pdf)> May 3, 2010 In the Australian Capital Territory, disclosure of contract is not only a matter of policy but also stipulated in the legislation. See Government Procurement Act 2001 (ACT) Part 3 <http://www.legislation.act.gov.au/a/2001-28/current/pdf/2001-28.pdf> . See also Freedom of Information Act 1981 (Nsw) s.15 A (Disclosure of government contracts with the private sector) <http://www.legislation.nsw.gov.au/fullhtml/inforce/act+5+1989+cd+0+N#pt.2-sec.15a>

²⁸² Some of the contracts are available in the Victoria Government Contract Publishing System website <http://www.old.tenders.vic.gov.au/CA256AEA00206A7D/webpages/PublicContractsFrameset?Open>

²⁸³ Department of Treasury & Finance (Victoria), *FRD 12A Disclosure of Major Contracts* (2005)

²⁸⁴ Bracks, *Ensuring Openness and Probity in Victorian Government Contracts, A Policy Statement*

²⁸⁵ Bracks, S., *Ensuring Openness and Probity in Victorian Government Contracts, Implementation Guidelines* (2010)

<[http://www.growingvictoria.vic.gov.au/CA256D800027B102/Lookup/EnsuringProbityGuide/\\$file/Guide.pdf](http://www.growingvictoria.vic.gov.au/CA256D800027B102/Lookup/EnsuringProbityGuide/$file/Guide.pdf)> May 3, 2010

applicable to all “departments” as defined by section 3 of the Financial Management Act 1994.²⁸⁶

Premier Bracks’ policy permits limited excision of contractual terms from disclosure, subject to the principles laid down under the Victorian FoI Act and the Victoria Civil and Administrative Tribunal’s (VCAT) decisions. The policy statement further requires that the scope and grounds of such excision must be provided.²⁸⁷ There are three reasons for exemptions or excision from disclosure under the policy statement: (1) trade secrets, (2) genuinely confidential business information and (3) material which if disclosed would seriously harm the public interest. Confidential business information is defined as information which is “*likely to expose [a private sector contractor] unreasonably to disadvantage*”.²⁸⁸ When confidentiality is granted, the policy requires that it is time limited up to six months and should be disclosed afterwards.²⁸⁹

Under the policy statement, the burden of proof is said to be shifted, in favour of disclosure.²⁹⁰ It is not clear what this means. Presumably the Bracks’ government intended that explanation and justification would be required every time non-disclosure is invoked. However, the current Victorian FoI Act applies differently, in

²⁸⁶ Financial Management Act 1994 (Vic)

²⁸⁷ Bracks, *Ensuring Openness and Probity in Victorian Government Contracts, A Policy Statement* 41 para.26

²⁸⁸ Ibid

²⁸⁹ Ibid para 23

²⁹⁰ Ibid Para 18: “*The Bracks Government is committed to maximum disclosure of all the contracts entered into by Departments. We will shift the burden of proof in favour of contract disclosure, reducing to a minimum the information that is withheld from the public. A requirement to disclose major contracts will be entrenched in legislation as a statutory obligation on Government agencies*”.

its s. 50 (4), which places the burden of proof of public interest towards disclosure on the requester. The government also promised in the policy statement that the requirement to disclose major contracts will be formalised into legislation.²⁹¹ Apparently, at the time of writing, this has not materialised.

In a June 2010 report²⁹² by the Victorian Auditor General it was revealed that government departments appears to be reluctant to disclose the full text of contracts (which is required for contracts worth more than 10 million USD). The audit finds that in three selected departments, only on 12 occasions were contracts worth more than 100,000 USD disclosed. Forty-three of the 144 contracts valued over 10 million USD had not been disclosed and logged on to the Contract Publishing System (CPS) website as required by the Policy statement. The Auditor General concluded that the level of non-compliance of publishing contracts worth more than 10 million USD is higher, and that it does “*reflect systemic breakdowns in disclosure and reporting controls that diminish transparency*”.²⁹³

The differential treatment on disclosure based on the value of contracts (those which cost more than 100,000 USD need to be given a title and those worth more than 10 million USD need to be fully disclosed and logged into VGPB’s Contract Publishing System) may have triggered “creative compliance”. On one occasion the Auditor General implied that several contracts on water quantity and quality monitoring by the Department of Environment and Sustainability, jointly worth 11.9

²⁹¹ Ibid

²⁹² Pearson, D.D.R., *Managing the Requirements for Disclosing Private Sector Contracts* (2010) <http://www.audit.vic.gov.au/pdf/20100623_Disclosures_Full_Report.pdf> November 10, 2010

²⁹³ Ibid, p.vii

million USD, were split into several parts, presumably in order to avoid the disclosure requirement. DSE subsequently denied the possibility of tender splitting and stated that each of the contracts was awarded through separate tender processes. The Auditor General replied: *“the fact that these contracts were entered into on the same day, for a similar time period and to provide identical services by the same supplier indicates poor procurement practice and results in avoiding the intended level of disclosure”*.²⁹⁴

Contracts between Aquasure and the Victorian Government for the establishment of Victoria’s Desalination Plant²⁹⁵ also fall under the scope of this policy. One of the points of controversy with the Desal contract is the obligation to pay for water produced irrespective of whether it is used (“Water Security Payment”) and the overall actual cost (per litre) of desalinated water.²⁹⁶ The figures are important because, according to one author, the actual cost of desalination will increase up to 4.8 billion USD in the 30th year or even more since the pressurisation of water transmission to regions with higher altitude may cause mains to burst.²⁹⁷ This may eventually add to the cost that consumers have to pay in the coming years.²⁹⁸

²⁹⁴ Ibid, p.xi

²⁹⁵ See section 4.1.2 above “Victorian Water businesses”

²⁹⁶ Fyfe, M., ‘Voters out of loop in ALP’s Victoria: a state of secrecy’ *The Age* <<http://www.theage.com.au/national/voters-out-of-loop-in-alps-victoria-a-state-of-secrecy-20101009-16d3b.html>> accessed November 15, 2010

²⁹⁷ Davidson, K., ‘Water plans drift behind a veil of secrecy’ <<http://www.smh.com.au/opinion/politics/water-plans-drift-behind-a-veil-of-secrecy-20100411-s0os.html>> accessed November 14, 2010

²⁹⁸ *“He concluded that each year, on average, every Melbourne water ratepayer would pay \$345. “John Brumby has in effect signed up every household and business in Melbourne to a debt which averages about \$9560.”* Millar, R. and Schneiders, B., ‘Desal plant a \$570m-a-year drain’ *The Age* <<http://www.theage.com.au/victoria/desal-plant-a-570mayear-drain-20100916-15enu.html>> accessed September 20, 2011

The contracts were finally published – in bulk – on the VGPB’s Contract Publishing System website under the category of “Building and Construction Machinery and Accessories” but with some items being excised.²⁹⁹ Forty-five items were excised from the Wonthaggi Desal Contracts³⁰⁰, these included calculation of early termination payments for the supply of electricity, annual minimum quantity of electronic tradeable renewable energy certificates, details of annual supply of water volume and compensation for relevant intervening events. The detail of the water security payment is blacked out in the version published in CPS³⁰¹ and was not revealed in a parliamentary inquiry.³⁰²

The Victorian Auditor General acknowledged that excisions on the Wonthaggi Desal Contracts were made after consultation with the Secretary of the DSE and

²⁹⁹ DTF, ‘Victorian Desalination Project’ (*Contract Publishing System, Department of Treasury and Finance, Victoria*)
<http://www.old.tenders.vic.gov.au/domino/Web_Notes/eTenders/etdrPublishing.nsf/ContractsByCategory/6CC923E330DE8F5CCA25767A00109C1E?OpenDocument#Downloads> accessed November 10, 2010

³⁰⁰ Pearson, *Managing the Requirements for Disclosing Private Sector Contracts*

³⁰¹ The Minister for Water of the State of Victoria and others, *Project Deed Schedule I* (2009)

³⁰² Standing Committee on Finance and Public Administration, *Inquiry into the business case for water infrastructure (Transcript), Hearing With Chloe Munro, Chairman of AquaSure Pty Ltd, 17 June 2010* (Victoria Parliament 2010)
<http://www.parliament.vic.gov.au/images/stories/documents/council/SCFPA/water/Transcripts/Munro_Final.pdf> accessed 15 February 2012. The dialogue runs as follows: “*The CHAIR — I guess to put the question directly: will the water usage payment essentially be the same dollar value, irrespective of the actual volume of water ordered? Ms MUNRO — I understand the question; however, I am not at liberty to answer that. Mr BARBER — Have a look at that table down the bottom, Chair. The CHAIR — The table down the bottom, Mr Barber, would be much more helpful if it had numbers on it*”. Chloe Munro is Aquasure’s Pty Ltd’s chairman and is bound by the confidentiality provision. The State Government, however, is not bound by such provision.

approved by the Minister of Water.³⁰³ Out of 65 excision proposals, 45 were approved. However, the parts that are excised are not summarised on the VGPB's Contract Publishing System website and the reason for excision is also absent.

DSE's failure to provide reasons for excision appeared to be in contravention of Bracks' policy, which requires that excisions are made on a case by case basis, in accordance with the principles of the 1982 Freedom of Information Act and are enforced with a time limit. DSE has no protocol to provide for the future release of information.³⁰⁴ Responding to the Auditor General's query on why excisions are not supplemented by explanations, DSE argued that it has followed all disclosure requirements on Partnership Victoria (see section 4.2.2) and that no such requirements exist on FRD12A.³⁰⁵ It also explains that it will provide additional explanation for such excision – "as required"³⁰⁶ – in its upcoming (2010) annual report. However, in its 2010 annual report, the DSE still did not provide justifications for excisions.³⁰⁷ It says only that it will disclose the items excised "*if and when the circumstances giving*

³⁰³ Pearson, *Managing the Requirements for Disclosing Private Sector Contracts* at p.14 "*The process to excise information also included consultation with the Minister for Water, the Victorian Civil and Administrative Tribunal and the Privacy Commissioner. DSE also sought independent legal advice. The secretary endorsed and the Minister for Water approved 45 excisions deemed commercially sensitive.*"

³⁰⁴ Ibid p.15

³⁰⁵ See para. 5 of DSE letter to Victorian Auditor General ibid

³⁰⁶ Ibid

³⁰⁷ It only provides several paragraphs with the heading "*Disclosure of major contracts note for the Victorian desalination plant*" explaining that it "*carried out a comprehensive assessment of the proposed excisions against the above criteria, and obtained all required approvals before releasing the documents publicly in November 2009*". Government of Victoria (Department of Sustainability and Environment), *Annual Report 2010* (2010) <[http://www.dse.vic.gov.au/CA256F310024B628/0/C9928523D9FF9B3ECA2577A1000C0AF5/\\$File/DSE+Annual+Report+2010.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/C9928523D9FF9B3ECA2577A1000C0AF5/$File/DSE+Annual+Report+2010.pdf)> November 01, 2010 at p. 228

rise to the exemption are no longer present".³⁰⁸ When and how these circumstances arise is not explained and, as such, there is no exact date as to where the excised items will be published.

Arguably DSE's argument could be technically correct since FRD12A – although it refers to Bracks' Policy Statement which requires excisions to be justified³⁰⁹ – does not explicitly mandate that government departments' need to provide reasons for excision. Nevertheless, it defeats the spirit of Brack's Policy Statement. This likely occurs due to the reliance of the contract publication requirement on a set of policies, instead of legislations.

4.3. Regulatory Decision Making

4.3.1. Licences

Melbourne Water does not have any licences since most of the governance system is provided through legislation and by itself is acting under delegated responsibility from the government in issuing licences for water diversion. Meanwhile, The Three Retailers: City West Water, South East Water, and Yarra Valley Water respectively, have their own separate business licences. There are five

³⁰⁸ Ibid Furthermore it states that "*The 45 excisions from disclosure on the basis of current state exemption requirements are to be disclosed in accordance with the state's requirements, if and when the circumstances giving rise to the exemption are no longer present, or those circumstances no longer give a basis for exemption under the Freedom of Information Act 1982 and/ or relevant state guidelines or requirements.*"

³⁰⁹ Department of Treasury & Finance (Victoria), *FRD 12A Disclosure of Major Contracts*

types of licences, respectively (a) a water licence; (b) a water and sewerage licence; a drainage licence; (d) a sewage treatment licence; and (e) a water headworks licence.³¹⁰

4.3.1.1. Criteria for approving licence

The criteria for approving licences is contained in the WIA 1994, in which it is determined that the Minister (of Water) has the discretion to refuse or grant licence applications for *any reason* that it considers appropriate.³¹¹ The WIA stipulates that the Minister *must not* grant an application unless it is satisfied that all of these prerequisites are fulfilled: (a) the applicant is financially viable; (b) the applicant has the technical capacity to comply with the conditions of the licence; and that (c) the applicant is a Victorian body corporate or a statutory corporation within the meaning of the State Owned Enterprises Act 1992.³¹² Any decision by the Minister with respect to a licence application must be communicated to the applicant in the form of a written notice. If the decision is in the form of a refusal of such application, the Minister is under an obligation to provide reasoning for such refusal.³¹³

4.3.1.2. Licence conditions

The conditions of a licence are determined by the Water Industry Act, the licence document itself and a statement of obligation issued by the Minister. The WIA only sets the general framework for licence conditions, namely, that it requires the payment of a specified charge, preventing the licensee from engaging in or

³¹⁰ Water Industry Act 1994 No. 121 of 1994, Version No. 063 s.5

³¹¹ Ibid s.6

³¹² Ibid

³¹³ Ibid s. 6(5)

undertaking specified business activities or any other business and requiring compliance with a Statement of Obligations issued by the Minister.³¹⁴

4.3.1.3. Legal obligation to publish licence

One key transparency mechanism in Victoria's water licensing activities is the prohibition of persons to apply for a licence unless the Minister has published in the Government Gazette and a newspaper circulating in the licensing area inviting the application of licences specifying the type of the licence.³¹⁵

The WIA contains some obligations on the part of the minister to announce and publish applications for licences in the newspaper circulating in Victoria.³¹⁶ Such announcement must specify the name of the applicants and the area which is intended to be covered by the licence. The Minister is also obliged to invite interested persons to make submissions with respect to the licence applications.³¹⁷ There is no requirement on the WIA to publish licences in newspapers, but the Minister must notify the applicant³¹⁸ in writing of his decision and, in the event of refusal, the reasoning for such refusal must be provided.³¹⁹

There is a requirement to publish notification in the Victorian Government Gazette pursuant to the issuance, revocation or amendment of licences under the WIA. This must specify the name of licensees, the term of the licence, the licence area and

³¹⁴ Ibid s. 7(4)

³¹⁵ Ibid s. 5 (2)

³¹⁶ Ibid , s.6.3.a

³¹⁷ Ibid s.6.3.b

³¹⁸ The applicant must be a Victorian body corporate or a statutory corporation See s. 6 (2) ibid

³¹⁹ Ibid s.6 (5)

the place where the copy of such licence may be inspected.³²⁰ In practice, licences are available from the websites of all of The Three Retailers except for South East Water.³²¹

In addition, the Minister is also obliged to provide notice for the making and issuance of the Statement of Obligation to a licensee or any amendments thereof in the Government Gazette.³²² All of the Statements of Obligations of The Three Retailers contain provision obligating (i) the document of the Statement of Obligations itself, (ii) information about the services the utility provides and (iii) information about water conservation and the efficient and responsible use of water³²³ “available to the public” by way of publication on the licensee’s company website, public inspection at the licensee’s offices and provision of the copies of such documents free of charge or at a reasonable charge.³²⁴

4.3.2. Selection and removal of economic regulators

The Essential Services Commission consists of a Chairperson and several full time and part time additional Commissioners, the number of which is determined by the Minister.³²⁵ Additional members may be appointed on a full time or part time basis or only for a specific period; or a specific inquiry or determination. The

³²⁰ Ibid , s. 13

³²¹ Government of Victoria, *Water and Sewerage Licence, Yarra Valey Water Limited A.B.N. 93 066 902 501, Reprinted incorporating amendments as at 28 July 2004* Government of Victoria, *Water and Sewerage Licence, City West Water Limited A.B.N. 70 066 902 467, Reprinted incorporating amendments as at 28 July 2004*. South East Water’s licence is not available on its website.

³²² Water Industry Act 1994 No. 121 of 1994, Version No. 063 , s.8

³²³ Ibid.

³²⁴ , *Water Industry Act 1994, Statement of Obligation, City West Water Limited*

³²⁵ Essential Services Commission Act 2001 (Vic), s.17

Chairperson³²⁶ and additional members³²⁷ of the Commission are appointed by the Governor in council. Requirement for and qualifications of the members of the Commission are regulated in the ESC Act. Both Chairperson and additional members of the Commission should have qualifications in one or more of these fields: industry, commerce, economics, law or public administration, either because of their knowledge or experiences.³²⁸

The Governor may suspend the Commissioners from office at which event the Minister must provide a full statement elaborating the grounds of such suspension to the House.³²⁹ Suspensions may only escalate into removal if the House in Parliament approves the removal through a Resolution. Pursuant to such resolution, the Governor must remove the Commissioner. However, if within 42 days after the Minister provided such a statement to the House, the House failed to produce a resolution, the Governor must reinstate the Commissioner to office.³³⁰

4.3.3. Conflict of interest

As a rule, the Chairperson of ESC cannot directly or indirectly engage in any other paid employment unless approved by the Governor.³³¹ This rule, however, is not applicable to the other members of the Commission other than the Chairperson.

³²⁶ Ibid s.18 (1)

³²⁷ Ibid s.21 (1)

³²⁸ Ibid, s18, s21

³²⁹ Ibid, s19 (4), s22 (5)

³³⁰ Ibid

³³¹ Essential Services Commission Act 2001 (Vic), , s.18

There is an obligation – applicable to all members of the Commission – to disclose existing or foreseeable pecuniary interest³³² to the Minister as soon as a member becomes aware of it. Following such declaration, the Commissioner is barred³³³ from taking any part in any matters related to the Decision, unless otherwise agreed by the Minister. Failure to comply with the obligation to declare pecuniary interest to the Minister does not affect the validity of any decision taken by the Commission.

4.3.4. Means for Acquiring Information

4.3.4.1. WIA 1994

The DSE are given wide powers by legislation to acquire information from the licensees (which includes The Three Retailers and Melbourne Water). The rationale for empowering the DSE with such authority is because the Minister of Water (who is a portfolio Minister at the DSE) issues licences to water companies and, therefore, is also responsible for the enforcement of the licence conditions. As an authority who issues licences, the Minister of Water is also accountable before the Victorian Parliament. Information from the companies is, therefore, essential for the Minister in order to establish whether or not the companies are complying with the licence

³³² Pecuniary interest as a result of supply of goods and services available to members of the public under similar terms and conditions are excluded from this rule *ibid*, s.27

³³³ *Ibid* at s.27 (3)

conditions and in order to present the Minister's accountability report to the Parliament and the public.

The powers to acquire information (which are delegated to "inspectors" under s.38) are limited to the following purposes: (a) the planning, construction, operation or maintenance of works; (b) technical performance standards; and (c) water quality standards.³³⁴ The types of powers range from the authority to conduct searches in premises, which include the power to inspect, take photographs or samples, seize or open any containers which allegedly contain information.³³⁵ Under s.45, WIA 1994 it also empowers DSE inspectors to require *persons* to give and/or produce information to the inspectors and to provide reasonable assistance to them in carrying out their duties.³³⁶

The differences between the "search" power (under s.38) and the "power to require information" to be submitted (under s.45) is with respect to its effect on another person. Under s.38, other persons remain passive, as their legal obligation is only to allow the inspectors to conduct search, inspect and seize anything on their premises. Whereas, under the power to require information to be provided (s. 45), third parties are required to be active in submitting already available information in their possession or in producing information which is not readily available. Failure to

³³⁴ Water Industry Act 1994 No. 121 of 1994, Version No. 063 s.38(1)

³³⁵ Ibid s.38 (2) and s.41

³³⁶ Ibid s.45 (1)

do so may entail penalty.³³⁷ Deliberately providing misleading information or documents is also punishable by penalty.³³⁸

The companies are obligated to keep separate accounts and records of their transactions and affairs which explain their financial operation and position. Licensees must also report annually water usage by non-domestic, non-agricultural users to the Minister, to be further reported to the parliament.³³⁹ There is also an obligation to report to the Minister, the ESC and the customer.³⁴⁰

4.3.4.2. ESC Act

While regulatory bodies are typically empowered with the authority to obtain information only from the regulated companies, the ESC has the power to acquire information from both (1) *any person*³⁴¹ and (2) the *regulated companies*.³⁴² Under s.37 (General power to obtain information and documents), the ESC can require *any person* to submit information or documents to them, and to appear before them, if they believe that such person has information or documents which are relevant and

³³⁷ Ibid s.45 (2)

³³⁸ Ibid s.45 (3)

³³⁹ Ibid s.77A

³⁴⁰ Ibid s.78

³⁴¹ Essential Services Commission Act 2001 (Vic) s.37

³⁴² Ibid s.37A

necessary for regulatory purposes.³⁴³ In doing so, the ESC must issue a written notice specifying the information or document required, the format in which the information must be submitted to them, the deadline; referral to s.37 and a copy of that section should be included in the notice.³⁴⁴ If such person fails to comply, it could be considered an offence which entails penalty.³⁴⁵ There are some limitations to this power. First, the obligation to submit information does not apply if the person has a “lawful excuse”³⁴⁶ and second, the Minister may limit these powers if it is believed that it is used in an *inquiry* (will be elaborated below) which is not directly correlated with the regulated industry.³⁴⁷ The ESC Act also protects disclosers by imposing penalties on those who threaten, incite or coerce to cause injuries, losses or disadvantages to them.³⁴⁸

Regulated companies must provide information as requested by the ESC in its notice.³⁴⁹ The ESC may require the companies to enter into arrangements with third parties in order to compel it to submit the information to the ESC.³⁵⁰ This section also

³⁴³ Ibid s.37

³⁴⁴ Ibid s.37 (2) and (3)

³⁴⁵ Ibid s.37 (4)

³⁴⁶ Ibid s.37 (5) A lawful excuse is when the disclosure to the ESC will cause the person to be incriminated or leads to a penalty for any other offence. Presumably, a court action may be required to disclose this type of information. S.37(8) clarifies that a person who discloses in good faith is not liable for any damage, injury or loss suffered by other person.

³⁴⁷ Ibid s 41 A. The limitation by the minister is provided through a ministerial direction

³⁴⁸ Ibid s.37 (7)

³⁴⁹ Ibid s.37A

³⁵⁰ Ibid s.37A (1) and (2)

empowers the ESC to enact a *Code of Practice* which specifies the types or classes of information that entities must maintain for regulatory purposes.³⁵¹

Inquiry powers do not include the power to enter utilities' premises, however, the inquiry power is linked with s.37 (General power to obtain information and document) above which empowers the ESC to request information from any person as described above.³⁵² Apart from that, there are no other powers provided by the ESC Act to conduct inquiries.

Inquiries can be conducted through the Minister's referral³⁵³ or by the ESC's own initiative.³⁵⁴ If the latter is the case, the ESC must first consult with the Minister.³⁵⁵ The ESC is obliged to publish notice of inquiry in the Government Gazette, newspapers and the internet, specifying the purpose of the inquiry, the matters to be inquired, the length of the inquiry, the period when the public may make submissions and the details of public hearings.³⁵⁶ The Act also specifies that in conducting inquiries, at least one public hearing must be held.³⁵⁷ If there are commercial confidentiality or public interest concerns, the hearing can be conducted in private.³⁵⁸ A very important transparency aspect is the requirement to publish the final report (by the Minister). The ESC is obligated to submit its final inquiry report to

³⁵¹ Ibid s.37A (3)

³⁵² Ibid s.41A

³⁵³ Ibid s.41 (1)

³⁵⁴ Ibid s.40

³⁵⁵ Ibid s.40

³⁵⁶ Ibid s.42 (1) and (2)

³⁵⁷ Ibid s.43(4) The ESC has the discretion to determine whether a person may appear on the hearing or be represented. See s. 43 (4) (b)

³⁵⁸ Ibid s.43 (5)

the Minister³⁵⁹ and must also dissect and indicate information which is confidential or commercially sensitive.³⁶⁰ Upon receiving the report, the Minister then must lay the copy to the Parliament,³⁶¹ ensure that the copies are available for public inspection³⁶² and make the copies publicly available.³⁶³ Only non-confidential reports are laid before the Parliament and available in the public domain.³⁶⁴

So, it is the Minister and not the ESC who is obligated to lay the reports in front of the Parliament and to make it available to the public. Presumably, this is an exercise of the ministerial responsibility doctrine, in which it is the Minister, as a political appointee, who is ultimately held accountable to the Parliament. The discretion in determining which part of the report is confidential, however, lies with the ESC and not the minister.³⁶⁵

4.3.4.3. WIRO and SOO

There are two categories of powers enjoyed by the ESC in acquiring information from the utilities under the WIRO. The first is with respect to price enactment where the ESC is given the power to request extra information from the

³⁵⁹ Ibid s. 45 (1)

³⁶⁰ Ibid s. 45 (2)

³⁶¹ Ibid s.45 (5)

³⁶² Ibid s.45 (6)

³⁶³ Ibid s. 45 (7)

³⁶⁴ Ibid s.45 (3)

³⁶⁵ Ibid s.45 (3)

utilities, in addition to what they have included in the Water Plan³⁶⁶ (*Water Plans* will be discussed further in the sections regarding Investment and Prices & Tariffs below).

Secondly, WIRO also empowers the ESC to conduct an audit against the utilities. An audit is carried out to ensure utilities' compliance with service levels, to verify the reliability and quality of information submitted to the ESC and to ensure its compliance with the Statement of Obligation (SOO).³⁶⁷ Audits made under WIRO are limited to only once per financial year.³⁶⁸ WIRO stipulates that all audit results must be publicly reported.³⁶⁹

4.3.4.4. Safe Drinking Water Act 2003

Another power to acquire information comes from the Safe Drinking Water Act. It is the Secretary of State who is empowered to require water storage managers or water suppliers to provide information.³⁷⁰ The Secretary can request any information especially in relation to compliance with water quality standards³⁷¹ and specify the format and frequency of delivery.³⁷² In addition, water storage managers and water suppliers are obligated to report on the condition of drinking water quality in Victoria every financial year.³⁷³ The Safe Drinking Water Act also protects the

³⁶⁶ Water Industry Regulatory Order (WIRO) para.12 The purpose for requiring utilities to submit additional information is to ensure their compliance with primary legislations in water services and ascertain that they have sufficiently consulted on the Water Plan with the relevant authorities

³⁶⁷ Ibid para.17

³⁶⁸ Ibid para 17(d)

³⁶⁹ Ibid para. 19

³⁷⁰ Safe Drinking Water Act 2003, No.46 of 2003 (Victoria) s.29(1)

³⁷¹ Ibid s.29 (2)

³⁷² Ibid s.29 (4) and (5)

³⁷³ Ibid s.32

quality of information by penalising those who knowingly supply false and misleading information or data.³⁷⁴

4.3.5. General Disclosure Policy

One of the functions of the ESC according to the WIRO is to “*publicly report the performance of a regulated industry.*”³⁷⁵ However, there are two limitations under the ESC Act to disclose information to the public. The first is a restriction on disclosing information which the ESC acquired by virtue of the powers granted by s.37 and s.37A of the ESC Act³⁷⁶ (see section 4.3.4.2) and second, restriction on disclosure of any information exempted by the FoI Act 1982.³⁷⁷ Both restrictions come with qualifications.

If the ESC had acquired information under s.37 or s.37A and at the time the information was provided to them the person giving the information stated that such information is confidential or commercially sensitive, the ESC must ask that person to provide (i) the reason why such information is deemed confidential and (2) the harm or detriment from disclosure.³⁷⁸ The ESC must not disclose information unless it is certain that disclosure will not cause harm to the person supplying it³⁷⁹ (or third parties that might be affected by it)³⁸⁰, or, that in such cases where harm occurs, the

³⁷⁴ Ibid s.55

³⁷⁵ Water Industry Regulatory Order (WIRO) para 16

³⁷⁶ Essential Services Commission Act 2001 (Vic) s.38

³⁷⁷ Ibid s.39

³⁷⁸ Ibid s.38 (1A)

³⁷⁹ Ibid s.38 (2) (a) (i)

³⁸⁰ Ibid s.38 (2) (b) (i)

public benefit would outweigh its harm.³⁸¹ If the ESC eventually decides to disclose such information, it must serve notice to the supplier of the information specifying the nature of the intended disclosure and its rationale in detail.³⁸² Persons receiving such notices may appeal the ESC's decision of disclosure.³⁸³

The ESC Act also prohibits the disclosure of information if it is acquired from other "Ministries or Agencies" and they are exempted under the FoI Act 1982.³⁸⁴ The provision does not apply the FoI Act 1982's exemption clauses to all information in ESC's possession, it only extends to information acquired by the ESC from another public bodies.

This means that an individual may only obtain regulatory information from a public body which acquired it in the first place – subject to some restrictions under FoI – and, on the other hand, the regulatory bodies can only disclose information if it is acquired by itself, after considering the harm and the public interest affected by the disclosure. It appears that this provision seeks to protect the exchange of information among regulatory bodies from disclosure by the ESC and, therefore, promotes uniformity on how FoI exemptions are applied among public bodies.

4.3.6. Investment

³⁸¹ Ibid s.38 (2) (a) (ii) and (b) (ii)

³⁸² Ibid s.38 (2) (c) and (d)

³⁸³ Ibid s.55 (1) (b) Interestingly, only those receiving notice under s.38 (2) (c) and (d) have the right to appeal, not all 'aggrieved' parties.

³⁸⁴ Ibid s.39

Each utility's Statement of Obligation (SOO) contains obligations for them to manage their assets in a way that would allow them to supply their services sustainably, maintain service levels and to minimise their assets' life-costs as well as the environmental, social and economic externalities that may be caused by its operation.³⁸⁵

The details of each utility's investment plan are contained in a "Water Plan", which must be submitted before the next regulatory period commences. The obligation to submit this "Water Plan" is embodied in the SOO.³⁸⁶ There is a minimum of information that must be contained in the Water Plan, among others: (a) outcomes to be delivered with respect to service levels, fulfilment of future demand, its compliance with SOO and other relevant legislations,³⁸⁷ (b) a description of how they propose to deliver those outcomes; (c) the utility's revenue requirements in that regulatory period; (d) the proposed price to be charged.³⁸⁸ Utilities are also required to describe, in their Water Plan, their proposal to meet their sustainability management plans, which incorporates climate change concerns, maintenance of natural assets and minimisation of environmental impacts.³⁸⁹

The WIRO states that there are two ways for prices to be determined by the ESC: by way of approval of a Water Plan submitted by utilities³⁹⁰ or by unilaterally

³⁸⁵ , *Water Industry Act 1994, Statement of Obligation, City West Water Limited* para 14.1

³⁸⁶ Ibid Part 3 The SOO also sets the deadline for submitting the Water Plan

³⁸⁷ These are deemed to be the Environment Protection Act 1970, Water Industry Act 1994, Safe Drinking Water Act 2003, the Food Act 1984 or the Health (Fluoridation) Act 1973.

³⁸⁸ , *Water Industry Act 1994, Statement of Obligation, City West Water Limited* para 7.3

³⁸⁹ Ibid para 25.1 and 25.2

³⁹⁰ Water Industry Regulatory Order (WIRO) para 8.a.

specifying prices if utilities fail to submit the Water Plan.³⁹¹ The latter should occur only if the utilities miss the prescribed deadline for the submission of the Water Plan or if it has been formulated without due regard to procedural requirements³⁹² as set out in the SOO and/or the regulatory principles of the WIRO.³⁹³ The “regulatory principles” obligate the ESC to allow the utilities to recover its expenditures and rate of return on assets, to provide incentives on sustainable water use and improve efficiency. It also obligates the price setting to have regard and to ‘take into account’ the interest of vulnerable and low income customers. In the English water industry, such principles are enshrined in a primary legislation.³⁹⁴

The Water Plan consists of outcomes which are expected to be delivered by the retailers, investment programmes required to deliver such objectives, the expenditures involved and the revenue in order to fund the expenditures.³⁹⁵ An exposure draft is presented to the ESC for review. The ESC must review the consistency between the prices in the Water Plan with WIRO as well as SOO and may also use external resources to review the utilities expenditure projections.³⁹⁶

³⁹¹ Ibid para 8b

³⁹² The so called procedural requirements are no more than the duty to consult the drafting of the Water Plan with relevant regulatory agencies (Environment Protection Authority, the Secretary to the Department of Human Services, and the ESC) with respect to their specific regulatory competences. See CWW SOO para 8

³⁹³ Water Industry Regulatory Order (WIRO) para 10. The regulatory principles are outlined in para. 14.

³⁹⁴ Water Industry Act 1991 (England) s.2

³⁹⁵ See for example Yarra Valley Water, *Water Plan 2009/10 - 2012/13*, Yarra Valley Water, November 2008 (2008) and , *Water Industry Act 1994, Statement of Obligation, City West Water Limited*

³⁹⁶ Water Industry Regulatory Order (WIRO) paras 9, 10 and 13.

The Minister of Water (in consultation with the Treasurer) and other regulatory agencies can give comments on the retailers' Water Plan.³⁹⁷ If the Minister requests, the retailer must make variation to its Water Plan. There is, at present, no obligation for the Minister to explain the rationale behind variation of the water plan and such a requirement would require amendments of relevant acts.³⁹⁸

With respect to other regulatory agencies, the retailer should only 'pay attention' to their comments. The retailers are under a duty to consult with customers but the SOO does not prescribe the detail and timeframe for such consultancies. The time frame between the Draft Water Plan and the submission of the Final Water Plan to the ESC is one month; meanwhile, the period between final submission and the ESC's obligation to "have regard" to comments from other regulatory agencies is two weeks.³⁹⁹ Customer consultation takes place within this one month period.

One of WIRO's regulatory principles is an obligation on the utilities to enable customers and potential customers to understand pricing and how it is calculated.⁴⁰⁰ This one month period is perceived to be too short to allow agencies and the public to comment on the Draft Water Plan. A four month timeframe between the Draft Water

³⁹⁷ See for example, , *Water Industry Act 1994, Statement of Obligation, City West Water Limited* para 8.1.a and 8.2

³⁹⁸ Victorian Competition and Efficiency Commission, *Water Ways: Inquiry into Reform of the Metropolitan Retail Water Sector, Final Report February 2008* p.153

³⁹⁹ Ibid

⁴⁰⁰ Water Industry Regulatory Order (WIRO) para 14 (1) (a) (ix) If utilities fail to adhere to this provision then the Water Plan may be deemed contrary to 'regulatory principles' and as a result they may need to be revised or the ESC will instead prescribe prices

Plan and the Final Water Plan is perceived to be ideal.⁴⁰¹ It is suggested that the SOO contain an obligation for the Minister to explain and publish his rationale for requiring the variation of the Water Plan. It is also suggested that other regulatory agencies publish their comments on the Draft Water Plan.⁴⁰²

Neither the WIRO nor utilities' SOOs contain specific obligations to publish the Water Plan. The SOO, however, requires that utilities "*develop and implement open and transparent processes to engage its customers and the community in its planning processes*".⁴⁰³ in addition to some obligations to make available to the public information about water supply, sewerage and recycled water services, water conservation and the efficient and responsible use of water; and also to put educational materials about water conservation into schools.⁴⁰⁴ In practice, the Water Plan is published on the ESC's website. The utilities also make available the water plans on their websites in order to ensure consistency with the obligation to develop an 'open and transparent' planning process.⁴⁰⁵

Another important document in the planning process is the "Corporate Plan". Information on the Water Plan feeds in to the corporate plans. All other 16 Victorian water businesses are obligated by the 1989 Water Act to submit corporate plans to the

⁴⁰¹ Victorian Competition and Efficiency Commission, *Water Ways: Inquiry into Reform of the Metropolitan Retail Water Sector, Final Report February 2008* See Box 7.3

⁴⁰² Ibid See Box 7.3

⁴⁰³ CWW SOO para 10.1

⁴⁰⁴ CWW SOO para 10.2

⁴⁰⁵ Lower Murray Water, *Lower Murray Water Exposure Draft Water Plan 2008-09 to 2012-13, October 2007* (2007) <<http://www.lmw.vic.gov.au/documents/132602PartC-8October2007.pdf>> Yarra Valley Water, *Water Plan 2009/10 - 2012/13, Yarra Valley Water, November 2008*

Minister and the Treasurer⁴⁰⁶ for their approval. However, ever since the retail function was unbundled from Melbourne Water into The Three Retailers, the applicability of this provision to the retailers is not clear.⁴⁰⁷ The Water Act does not obligate the corporate plans to be published, however, companies must ensure that they are ready for inspection, upon request.⁴⁰⁸ In practice, South East Water publishes this on their website⁴⁰⁹ while other utilities do not. The ESC and the retailers often refer to Corporate Plans on their official documents.

4.3.7. Tariffs & Prices

The Water Plan exposure draft is made available for public review. The final drafts are also published. Unless the ESC decides to determine prices on its own, the Water Plan will be the substantial document upon which the prices are based.

Various consultations are carried out in the price setting process. The ESC has a good practice of making the consultation documents and the public comments and

⁴⁰⁶ Corporations Act 2001 Part 13

⁴⁰⁷ According to a Guide issued by the Victorian Government: “Each water business must submit an annual corporate plan that provides a statement of corporate intent, expected activities and a financial forecast for the following five years.” See Victorian Government, *A Governance Guide to the Victorian Water Industry* (The State of Victoria 2009) p. 10 ‘Water business’ refers also to The Three Retailers. However, according to a manual issued by the Victorian Water Industry Association, the corporate plans are obligated only for the statutory water corporations. See Victorian Water Industry Association Inc, *Legal Compliance and Information Manual Victorian Water Industry* (2009) para 17.1

⁴⁰⁸ Corporations Act 2001 s.249

⁴⁰⁹ South East Water, *Water Solutions for a Better Future, Corporate Plan 2011–2016* (2011) <http://www.southeastwater.com.au/SiteCollectionDocuments/About_Us/Corporate_Reports/Corporate_Plan-2011_2016.pdf> October 24, 2011

submissions available on its website.⁴¹⁰ Water utilities also conduct various consultations with stakeholders, as they are required by the SOO⁴¹¹ to develop an *open and transparent* planning process. One of the “regulatory principles” under WIRO⁴¹² – with which the utilities must comply if they want their Water Plan to be approved by the ESC – is to enable customers to understand pricing. As such, the water utilities’ method of consultation is embodied in their Water Plan.

ESC’s power to make determinations is vested in the ESC Act.⁴¹³ The ESC Act obligates that every determination includes a statement of purpose and the reason for making such determination.⁴¹⁴ When a determination is made, a notice must be published in the Government Gazette, the daily newspaper generally circulating in Victoria *or* on the internet.⁴¹⁵ Such a notice must contain information on the nature and effect of the determination, the effective date and how the copy of such determination may be obtained from the Commission.⁴¹⁶ The ESC is obliged to send the copies of its Determination to regulated entities and to any person who makes inquiries.⁴¹⁷

⁴¹⁰ ‘Melbourne metropolitan water price review 2009-10 to 2012-13, Consultations’ (*Essential Services Commission*,)

<<http://www.esc.vic.gov.au/public/Water/Consultations/Melbourne+metropolitan+water+price+review+2009-10+to+2012-13/Melbourne+metropolitan+water+price+review+2009-10+to+2012-13.htm>>
accessed October 16, 2011

⁴¹¹ , *Water Industry Act 1994, Statement of Obligation, City West Water Limited*

⁴¹² Water Industry Regulatory Order (WIRO)

⁴¹³ Essential Services Commission Act 2001 (Vic) s.33

⁴¹⁴ Ibid s.35 (1)

⁴¹⁵ Ibid. s.35 (2)

⁴¹⁶ Ibid. s.35 (3)

⁴¹⁷ Ibid. s. 35 (4)

4.3.8. Service Levels and Customer Service

The ESC has the power to make determinations⁴¹⁸ with respect to standards and conditions of service and supply, licensing, market conduct and ‘other’ economic regulatory matters as stipulated by the *empowering instrument*⁴¹⁹. Other normative sources for service levels and customer service are found in the WIRO, the Codes of Practice and the approved Water Plan. Drinking water quality standards are regulated directly by legislation.⁴²⁰

The WIRO enables the ESC to prescribe service standards, either by approving companies’ Water Plans or by issuing Codes.⁴²¹ In practice, quantitative service standards (such as the average time taken to repair leaks or average duration or planned interruption) as well as Guaranteed Service Level payment schemes of each company are approved by the ESC through the Customer Services Code (CSC)⁴²² as the conditions differ from company to company.

The CSC sets the general standards on what the customer can expect from its’ utility.⁴²³ It contains the utilities’ duty to connect to customers, and the utilities’ right

⁴¹⁸ Ibid at s.34

⁴¹⁹ “Empowering instrument” is defined as other relevant legislations; a Governor’s Order, the Tariff Order; or the Water Industry Regulatory Order made under Part 1A of the Water Industry Act 1994, see s.3 of the Essential Services Commission Act 2001 (Vic)

⁴²⁰ Safe Drinking Water Act 2003, No.46 of 2003 (Victoria)

⁴²¹ Water Industry Regulatory Order (WIRO) para 15

⁴²² Essential Services Commission, *Customer Service Code Metropolitan Retail and Regional Water Businesses* (Issue No 7, 15 October 2010, 2007) <<http://www.esc.vic.gov.au/NR/rdonlyres/D8B6324D-1531-4BD2-B9A6-80FE9E0A44D1/0/CustomerServiceCode.pdf>> these forms Schedules 2 and 1 of the CSC

⁴²³ Ibid

to refuse or discontinue connection to waste water service which is not in accordance with the utilities' terms. The Code also regulates charges that water businesses can impose on customers, the complaints and disputes policy and the resolution of disputes. The CSC also requires utilities to provide customer information about referral to EWOV and other external dispute resolution when a complainant is not satisfied with the utility's response.⁴²⁴ One key transparency mechanism is the obligatory publication of the Customer Charter containing the condensed form of the CSC and explaining the details of service levels and customer service standards that customers can expect from the utilities.⁴²⁵

The format of billing is regulated in the Code.⁴²⁶ It is stipulated that a bill must contain certain information such as the date of issue, the customer's billing address and account number, including the amount, the date and ways for the customer to pay the bill, the total of any payments made by the customer since the last bill, information on concessions available and any concession to which the customer may be entitled, and in the event of financial difficulties, the channels available to resolve the situation.

Bills must be broken down into several parts to increase transparency: any service charge to the property, the usage charge for each service to the property, other charges in connection with the provision of services and rates and other charges.⁴²⁷ The bill must also contain graphical illustrations of the customer's current water and recycled water usage, the customer's usage for each billing period over the previous

⁴²⁴ Ibid para 3.2

⁴²⁵ See *ibid* Part C (Customer Charter)

⁴²⁶ Ibid part 4, p.5

⁴²⁷ Ibid p. 5-6

12 months; and a comparison of the customer's usage with the customer's usage for the same period of the previous year.

In case of financial difficulty, a water business is obligated to make flexible payment plans according to the customer's capacity to pay. Other measures such as referral to the Utility Relief Grant Scheme or free financial advice are available. There is also a hardship policy⁴²⁸ which will be applicable if a customer has the intention but not the financial capability to pay its bill. The code forbids utilities to employ supply restriction, legal action, or any additional debt recovery costs if a customer is suffering hardship.⁴²⁹ There is a requirement in the Code that this hardship policy must be published on the utility's website and a copy must be made available to a customer upon request.⁴³⁰

As for water quality, the Safe Drinking Water Act requires the publication of water quality monitoring programmes within seven days after the test results are compiled.⁴³¹ There are penalties for the publication of knowingly misleading materials.⁴³² The Secretary of State can impose additional reporting duties if there are risks to public health⁴³³ and to require water suppliers to notify customers that treatment might be required before drinking.⁴³⁴

⁴²⁸ Ibid p.9-10

⁴²⁹ Ibid para 5.4

⁴³⁰ Ibid para 5.4

⁴³¹ Safe Drinking Water Act 2003, No.46 of 2003 (Victoria) s.23

⁴³² Ibid s.23

⁴³³ Ibid s.34 (1) and (2)

⁴³⁴ Ibid s.34 (3) (b)

Unlike England, however, the “Guaranteed Service Levels” schemes are so far voluntary. Business is not bound to provide compensation to customers for failures to meet service levels. Lack of clarified service levels⁴³⁵ and inadequate historical data on service levels are among the reasons why some businesses are reluctant to propose GSL Schemes.⁴³⁶ All three retailers have GSL schemes.

The Customer Service Code (CSC) obligates utilities to make available to customers all regulatory instruments including the CSC itself.⁴³⁷ The GSL must be approved by the ESC. After they are approved, they form a part of the ESC-issued Customer Service Code.⁴³⁸ As every code must be published, the approved GSL schemes are also automatically published along with the CSC.

4.3.9. Non-compliance

The ESC publishes performance reports on the retailers regularly. The performance report synthesises data from each retailer’s Key Performance Indicator

⁴³⁵ GSL payments are said to be appropriate when businesses propose higher service levels than what is required by regulation. The existing service levels already require compliance. GSL may have disincentives; for example, utilities may choose to pay GSL rather than improving the service. See Brody, G., *Policy Proposals for refinements to Essential Services Commission regulatory framework for water* (Prepared for the Department of Sustainability and Environment by the Consumer Law Centre Victoria) <www.consumeraction.org.au/downloads/DL91.pdf>

⁴³⁶ Lower Murray Water, *Lower Murray Water Exposure Draft Water Plan 2008-09 to 2012-13*, October 2007 p.9

⁴³⁷ Essential Services Commission, *Customer Service Code Metropolitan Retail and Regional Water Businesses* para 12.8

⁴³⁸ Ibid See Schedule 1 (Approved GSL Schemes)

set by the ESC and through audits made by ESC.⁴³⁹ Water utilities' compliance with service levels is outlined in the performance report.

The ESC has enforcement powers against contraventions with WIRO, Codes or Determinations made by it, applicable only when such contraventions are deemed to be of a “non-trivial” nature.⁴⁴⁰ There are two kinds of enforcement orders: provisional and final. The purpose of such orders is to ensure compliance with WIRO, Codes and Determinations or in rectifying the occurrence of contraventions.⁴⁴¹ A final order is not required if the utilities provide an undertaking or that the ESC is satisfied with their actions.⁴⁴² Inquiries might be established before any sanctioning is imposed.

Penalties are available for not complying with the orders.⁴⁴³ There is room for objection and submission.⁴⁴⁴ One key transparency mechanism of non-compliance is the publication of the orders in the Government Gazette.⁴⁴⁵

4.3.10. Redress

A water utility's operational licence contains a clause obligating the utility to enter into a dispute resolution scheme. There is no specific reference to EWOV (the Energy and Water Ombudsman of Victoria) on utilities' licences. The Three Retailers

⁴³⁹ Essential Services Commission, *Water performance report Performance of urban water businesses 2009-10* (December 2010) <<http://www.esc.vic.gov.au/NR/rdonlyres/7C1CEDEC-37DA-4C8F-A298-7423D1524305/0/RPT200910urbanwaterperformancereports20101222.pdf>> September 20, 2011

⁴⁴⁰ Essential Services Commission Act 2001 (Vic) s.53(1)

⁴⁴¹ Ibid s.53(2)

⁴⁴² Ibid s.53(5)

⁴⁴³ Ibid s.53(9)

⁴⁴⁴ Ibid s.53(6)

⁴⁴⁵ Ibid s.53 (7)

licences contain only a general obligation for the utilities to enter into a dispute resolution scheme.⁴⁴⁶ In practice, utilities enter into contractual agreements with EWOV to resolve disputes.

The obligation to inform the public of the existence of a dispute resolution body lies with both the utilities and the EWOV itself – by virtue of its Charter. Utilities are obligated under the ESC Code to “*provide to customer, information about referral to [EWOV] and other relevant external dispute resolution*”, in the event that the customer is not satisfied by the response from the water utility.⁴⁴⁷ The EWOV Charter, meanwhile, contains the obligation to promote its dispute resolution scheme and to make available to the public “*an accurate and up-to-date list of all Participants*”.⁴⁴⁸ It appears from the Code that the obligation to inform of the existence of a dispute resolution body is triggered only when the customer is not satisfied with the utility’s explanation. When a customer is satisfied, the obligation to inform the existence of the EWOV scheme does not arise.

The Decision by the Ombudsman shall be made in writing and should provide rationales.⁴⁴⁹ The Decision must be published but the names of the parties must not be

⁴⁴⁶ Government of Victoria, *Water and Sewerage Licence, Yarra Valey Water Limited A.B.N. 93 066 902 501, Reprinted incorporating amendments as at 28 July 2004* Government of Victoria, *Water and Sewerage Licence, City West Water Limited A.B.N. 70 066 902 467, Reprinted incorporating amendments as at 28 July 2004* para 7b

⁴⁴⁷ Essential Services Commission, *Customer Service Code Metropolitan Retail and Regional Water Businesses* para 3.1.d

⁴⁴⁸ Energy and Water Ombudsman Victoria, *Energy and Water Ombudsman Charter 30 May 2006* para. 2.2

⁴⁴⁹ Ibid para 6.2

identified.⁴⁵⁰ From the perspective of the complainant, this requirement is understandable, since water disputes may involve the indication of a financial problem which is a matter of a complainant's privacy. For the utilities, however, water disputes with complainants may reveal its compliance with service level and customer rights. Such information may be in the public interest to be disclosed. The EWOV Charter stipulates that in the event of a dispute utilities should provide all relevant information to the Ombudsman, except for confidential information of a third party, after a reasonable effort by the utilities to acquire it.⁴⁵¹ There is an obligation for the Ombudsman "*to act in accordance with accepted privacy principles*".⁴⁵² It is not clear to whom this privacy concept is applicable, since the corporation could also, to a certain extent, invoke some privacy protection.

Finally, EWOV's form as a private entity – a company limited by guarantee – has cultivated criticism in the literature.⁴⁵³ EWOV's private status means that the FoI Act will not be applicable to it – this will be discussed in another section below. However, in terms of the active disclosure rule the redress mechanism provided by EWOV is adequately transparent.

⁴⁵⁰ Ibid para 6.1

⁴⁵¹ Ibid para 5.1.c

⁴⁵² Ibid, para 5.1.d

⁴⁵³ Criticism on the existence of EWOV as a "creature of contract" (Company Limited by Guarantee) and its accountability implications has been raised in the literature. See O'Shea, P. and Rickett, C., 'In Defence of Consumer Law: The Resolution of Consumer Disputes' (2009) 28 Sydney L Rev 139 Stuhmcke, A., 'How good is private justice?' 71(1) The Law Institute Journal 6 Zifcak, S., 'Complaint Resolution in Government Owned Corporations and Privatised Utilities: Some Legal and Constitutional Conundrums' in Michael J. Whincop (ed), *From bureaucracy to business enterprise: legal and policy issues in the transformation of government services* (Ashgate 2003)

4.4. Corporate Governance

The Three Retailers are a Public Company Limited by Shares, with the Victorian Government as the sole Shareholders. This type of company is subject to certain disclosure requirements under the Australian Corporations Act of 2001. In addition, The Three Retailers are also regulated by the Water Industry Act 1994 (Vic), the State Owned Enterprise Act 1992, the ESC Act of 2004, WIRO, and a set of Codes prescribed by the ESC. The disclosure rules applicable to The Three Retailers are, therefore, a result of a combination of these regulatory frameworks.

4.4.1. Corporate structure and the Board

The corporate structure of The Three Retailers follows the Corporations Act, as they were established under it. The Corporations Act 2001 contains obligations for companies to lodge to ASIC personal details of a new secretary or director of the company.⁴⁵⁴ It obligates companies to report to their *members*, (i) the financial report, (ii) the directors' report, and (iii) the auditor's report.⁴⁵⁵ There is no public disclosure requirement, although if members elect, they may choose that companies publish these reports on their websites, which would render them available to the public at large.⁴⁵⁶

As an SOE, The Three Retailers are subject to reporting rules under the SOE Act which contain some accountability mechanisms. The SOE Act requires the

⁴⁵⁴ Corporations Act 2001 s. 205 B The details include their given and family names; all of their former given and family names, date and place of birth; and addresses.

⁴⁵⁵ Ibid s.314

⁴⁵⁶ Ibid s.314 (1AA)

Treasurer to present accounts and report to the Parliament on (i) the retailers' memorandum and articles of association as well as its amendments, (ii) financial reports, directors' reports and auditor's report and (iii) every report by the Auditor General with respect to the company.⁴⁵⁷ There is no requirement to publicly disclose the contents of these reports and accounts in the SoE Act.⁴⁵⁸ When they are tabled at Parliament the author assumes that they are under public scrutiny and can be accessed through the state Gazette.⁴⁵⁹ In practice, the annual report, which also contain the directors' report, financial report and auditor general's report is published by The Three Retailers.⁴⁶⁰

Under the Public Administration Act (PAA)⁴⁶¹ the Minister has the authority to appoint, remove or recommend the appointment and removal of the directors of a State Owned Company.⁴⁶² The PAA also determines that the board of a State-Owned Company is “*accountable to the Minister responsible for the entity for the exercise of*

⁴⁵⁷ State Owned Enterprises Act 1992 (Vic) s.75

⁴⁵⁸ The Water Industry Act actually requires retailers to report to the Minister, the Commission and its customers. However, this general reporting obligation does not detail what information it must report. See Water Industry Act 1994 No. 121 of 1994, Version No. 063 s.78

⁴⁵⁹ However, the Victorian Government Gazette is not user friendly. The author is unable to find any record of The Three Retailers' Memorandum and Articles of Association or any reports by its directors.

⁴⁶⁰ South East Water, *Annual Report 2010-2011 including the Financial Report*, (2011) <http://www.sewl.com.au/SiteCollectionDocuments/Corporate_Reporting/Annual_Report_2010-11.pdf> October 20, 2011 Yarra Valley Water, *Yarra Valley Water Ltd, Annual Report 2010/11* (2011) <<http://www.yvw.com.au/yvw/groups/public/documents/document/yvwannualreport2011.pdf>> October 20, 2011 City West Water, *City West Water Ltd, Annual Report 2011* (2011) <http://www.citywestwater.com.au/documents/annual_report_2011.pdf> October 20, 2011

⁴⁶¹ The PAA define “Public Entity” as “...a body, whether corporate or unincorporated that is established by or under an Act (other than a private Act) or the Corporations Act”. See Public Administration Act (Victoria) 2004 s.5 (1)

⁴⁶² Ibid s.85 (2) (b) (i)

its functions”⁴⁶³, in this case, the Minister of Water. In addition, the Minister may give directions to them or request information from them.⁴⁶⁴ All of these powers enjoyed by the Minister shall be held accountable to the Parliament.⁴⁶⁵

The prerequisite for becoming a director is prescribed only generally by the Corporations Act.⁴⁶⁶ The rules of appointment and dismissal for the board members are not available in the public domain, although presumably, as an entity established under the Corporations Act, they are prescribed by a resolution.⁴⁶⁷ As every amendment of the company’s Memorandum and Articles of Association must be tabled by the Treasurer to the Parliament, the resolutions should, therefore, be available and accessible at the Victorian Government Gazette.⁴⁶⁸

In practice, the appointments of members of The Three Retailers’ Board are quite transparent. The Department of Sustainability and Environment issue an advertisement accessible through its website, outlining the vacant position, its duties and challenges, links to the remuneration rules, the selection criteria and its process

⁴⁶³ Ibid s.85 (1)

⁴⁶⁴ Ibid s.85 (2) (b) (ii)

⁴⁶⁵ Ibid s.85 (2)

⁴⁶⁶ Corporations Act 2001 s.201B. It only specifies the minimum age of 18 and that if a person was previously disqualified, ASIC’s permission would be required

⁴⁶⁷ Ibid s.203D The Public Administration Act contain rules on removal of directors which are vested on the person appointing them. However, for State-Owned Companies, this rule can be derogated by the companies’ constitution See. Public Administration Act (Victoria) 2004 s.89 (10)

⁴⁶⁸ The author, however, is unable to find any of the retailers’ Articles of Association at the Victorian Government Gazette Kothari, ‘Privatising human rights—the impact of globalisation on adequate housing, water and sanitation’

and the procedures to apply.⁴⁶⁹ After being shortlisted and endorsed by the cabinet, the Minister for Water announces the result of the selection process.⁴⁷⁰

However, the Corporations Act allows directors to appoint one or more managing director from among themselves⁴⁷¹ or “alternate director” and subsequently delegate their responsibilities to them.⁴⁷² This can be done without any interference by the Treasurer or the Minister⁴⁷³, unless it is specified otherwise in the company’s constitution.

4.4.2. Related party transaction

The Corporations Act regulates the provision of financial benefit to related parties, and obligates members’ approval for such transactions, unless the transaction is carried out at arm’s length or is less favourable than arm’s length.⁴⁷⁴ This arrangement, however, is in place in order to protect company members “as a whole”

⁴⁶⁹ Department of Sustainability and the Environment, ‘Melbourne Water Retailer Board Director’ <www.ourwater.vic.gov.au/boardappointments> accessed January 4, 2011

⁴⁷⁰ State Government of Victoria, ‘Appointments to Melbourne region water boards’ (September 6, 2011) <<http://www.premier.vic.gov.au/media-centre/media-releases/1910-appointments-to-melbourne-region-water-boards.html>> accessed October 21, 2011

⁴⁷¹ Corporations Act 2001 s.201 J This rule could be replaced by the company’s constitution

⁴⁷² Ibid s.201K This rule could be replaced by the company’s constitution

⁴⁷³ The Victorian Parliament’s Public Accounts and Estimate Committee cited the appointment of City West Water’s CEO by the Board which was conducted without any involvement from the Minister or Treasurer. Victoria Parliament Public Accounts Estimates Committee, *Report on the inquiry into corporate governance in the Victorian public sector : sixty third report to the Parliament* (2005) p.48

⁴⁷⁴ Corporations Act 2001 s.208 According to the Act, ‘financial benefit’ is to be interpreted broadly, even if criminal or civil penalties may be involved and it includes any transactions such as giving or providing finance or property, buying, selling, leasing an asset, supplying or receiving services, issuing securities or granting an option, taking up or releasing an obligation in connection with related party. See also s.210

and not specifically tailored for consumer protection.⁴⁷⁵ In addition, the definition of “related party” only covers “controlling entities” and directors and spouses and, as such, is not wide enough to cover all affiliated entities.⁴⁷⁶ There is no public disclosure requirement for such transactions.

The Corporations Act requires compliance with accounting standards⁴⁷⁷ and mandates the Australian Accounting Standards Board to issue such accounting standards.⁴⁷⁸ The AASB’s⁴⁷⁹ definition of “related party”⁴⁸⁰ is broader than the Corporations Act and it requires public disclosure of transactions entered into with them in the companies’ annual reports.⁴⁸¹ However, the 2009 edition of AASB 124 excludes government entities from its public disclosure obligation.⁴⁸²

The ESC enacted the Regulatory Accounting Code (RAC), which regulates both transactions with a “related party” and with a “third party”. A related party is defined as any other entity subject to control or significant influence by the water business whereas a third party is a term used to cover transactions with any party which is not categorised as a related party.⁴⁸³ The definition of “related party” in the RAC is a simple one and covers the relationship between the water businesses and a

⁴⁷⁵ Ibid s.207

⁴⁷⁶ Ibid s.228 Various parties are included in the definition of related party, including “controlling entities”, parties ‘acting in concert with a related party as well as directors, spouses (and de facto spouses) and relatives (parents and children)’

⁴⁷⁷ Ibid s.296(1)

⁴⁷⁸ Ibid s.334

⁴⁷⁹ Australian Accounting Standards Board, *AASB 124, Related Party Disclosures* (2009)

⁴⁸⁰ Ibid

⁴⁸¹ ibid para 18

⁴⁸² Ibid

⁴⁸³ Essential Services Commission, *Water Industry Regulatory Accounting Code, October 2009, Issue No. 4* (2009) p.11

daughter company or any other company within its influence. This is because, unlike the English water utilities with multiple layers of ownership, the Victorian Government is the ultimate shareholder of the companies.

In conducting transactions with a related party, water businesses are required to disclose the names of the related party, the water businesses interest in them, the value of payment, a description of how the payment is reflected through RAC and a description on how shared costs are allocated.⁴⁸⁴ Similar to the English June Return Reporting Manual⁴⁸⁵, information on related party transactions are confidential. For transactions with any third parties worth more than 1 million USD of Opex or 10 million USD of Capex, the names of the third parties, description of the service, the values of payments made to them, a description of the basis of the payment made and how they are reflected in RAC must be provided.⁴⁸⁶

As the Corporations Act requires no public disclosure of a transaction which provides benefit to a related party, the AASB exempts public disclosure requirements for government entities and the RAC related party disclosure to ESC is confidential; there are no normative requirements for the public disclosure of related party transactions entered into by The Three Retailers. However, as a matter of practice, all

⁴⁸⁴ Ibid part B.12

⁴⁸⁵ Ofwat, *Chapters 30 & 31: Transactions with Associated Companies, June return reporting requirements and definitions manual 2011, Issue 1.0 - January 2011* (Ofwat 2011) <<http://www.ofwat.gov.uk/content?id=07f6e8a1-2ef2-11e0-805b-21f1b94cbce2>> accessed June 7, 2011

⁴⁸⁶ Essential Services Commission, *Water Industry Regulatory Accounting Code, October 2009, Issue No. 4* part B.11

of The Three Retailers still published their related party transactions in their 2010-2011 annual reports.⁴⁸⁷

4.4.3. Corporate restructuring

Under the SOE Act prescribed Articles of Association, no offering, allotment issuance of shares, disposal or sale of a main undertaking and involvement in acquisition, or disposal of shares in a subsidiary is possible without a ‘special resolution’.⁴⁸⁸ As the Victorian government is the sole owner of The Three Retailers, they obtain ultimate control of such resolutions.

Assuming the Treasurer agrees to the sale of assets or shares of The Three Retailers, will the process be transparent? The SOE Act contains no reference as to public disclosure of such plans. Presumably, this is perceived as a policy matter in which the Treasurer and other Cabinet members would be subjected to Parliamentary scrutiny. As discussed above, any changes to the company’s Memorandum or Articles of Association must be tabled at the Parliament.⁴⁸⁹

However, the Constitution requires that water utilities are a “public authority”, accountable to the Minister.⁴⁹⁰ This provision is “entrenched” as it can only be modified if a special majority is achieved.⁴⁹¹ Therefore, every corporate restructuring

⁴⁸⁷ South East Water, Annual Report 2010-2011 including the Financial Report Yarra Valley Water, Yarra Valley Water Ltd, Annual Report 2010/11 City West Water, City West Water Ltd, Annual Report 2011

⁴⁸⁸ SOE Act 1992, Exhibit I, para 3,4,5

⁴⁸⁹ State Owned Enterprises Act 1992 (Vic) s.75

⁴⁹⁰ Constitution Act 1975, No. 8750 of 1975, Version No. 196 s.97 (1) (2)

⁴⁹¹ Ibid s.18(2)(h)

measure which will affect the status of the water utility as a Public Authority would require a constitutional change by parliamentary vote. As such a plan would require parliamentary scrutiny and provoke a public debate, it is a transparency mechanism in itself.

4.5. Passive Disclosure Rule

4.5.1. Applicability of FoI Act into water institutions

Table 3

Institutions	Role	FoI Applicable?
Minister of Water; Department of Sustainability and Environment	General policy/ direction and Licensing	Yes
Treasurer at the Department of Treasury	Financial management	Yes
Secretary at the Department of Health	Drinking Water	Yes
Essential Services Commission	Pricing and monitoring of performance	Yes
Environment Protection Authority	Environmental protection, waste water discharges	Yes
Energy and Water Ombudsman	Consumer dispute	No
Victorian Ombudsman	Public Service Complaints	Yes
City West Water Ltd	Retail water supply and sewerage services in Melbourne metropolitan area	Yes
South East Water Ltd		Yes
Yarra Valley Water Ltd		Yes
Melbourne Water	Bulk Water Supplier	Yes
Aquasure	Consortium of SUEZ-Degremont, et al, water desalination plant, concessionaire.	No.

The Victorian FoI Act is applicable to “Agencies”⁴⁹², which could be in the form of a Government Department, Council or a Prescribed Authority. “Prescribed Authorities” under the FoI Act cover (a) a body corporate for a public purpose or a body unincorporated created by the Governor in Council or by a Minister,⁴⁹³ (b) any other body declared by the regulations to be a prescribed authority either because they are supported directly or indirectly by government funds or through other assistance or over which the State is in a position to exercise control or a body established by or under an Act of Parliament.⁴⁹⁴

A branch of the executive in Victoria is covered by the FoI Act as a government department. The Minister of Water, Department of Sustainability and Environment, Treasurer at the Department of Treasury, Secretary at the Department of Health, Essential Services Commission and Environment Protection Authority all fall under this category.⁴⁹⁵

Melbourne Water is covered under the Act as a Prescribed Authority, a body established under an Act of Parliament.⁴⁹⁶ The Three Retailers: City West Water Ltd, South East Water Ltd and Yarra Valley Water Ltd are a Prescribed Authority under

⁴⁹² “*agency* means a department council or a prescribed authority”, “...*council* has the same meaning as in section 3(1) of the **Regional Government Act 1989**” ; “*department* means a department within the meaning of the **Public Administration Act 2004** or an office specified in section 16(1) of that Act”; Freedom of Information Act 1982 (Victoria) No. 9859 of 1982 Version No. 066 , s.5(1)

⁴⁹³ Ibid, s.5(1) (a).

⁴⁹⁴ Ibid, s.5(1) (b)

⁴⁹⁵ Ibid, s.5(1)

⁴⁹⁶ Freedom of Information Act 1982 Section 5a

the Victorian FoI Act as confirmed by the Freedom of Information Regulations 2009.⁴⁹⁷

Not covered by the FoI Act are the Victorian Energy and Water Ombudsman (EWOV) and Aquasure. EWOV is not covered by the FoI (Vic) Act as it is a company limited by guarantee and is not yet determined as a Prescribed Authority through the Freedom of Information Regulations. Aquasure, the consortium partnering with Victorian government to provide desalination services to Melbourne Water, is a purely private entity. Aquasure is not covered by the Victorian FoI Act although information it submits to the government during the tender process and in the course of routine regulatory activities can be subjected to FoI requests. This reveals that the 'privatisation' of services (be that in the form of dispute resolution or provision of bulkwater) hinders the application of the FoI Act.

4.5.2. Exemption clauses

The FoI Act (Vic)⁴⁹⁸ contains a number of exemptions: personal information, cabinet documents (s 28), Commonwealth's diplomatic matters (s 29A), internal working documents (s 30); law enforcement documents (s 31); documents affecting legal proceedings (s 32); documents affecting personal privacy (s 33); trade secrets, etc. (s 34); material obtained in confidence (s 35); any information where disclosure would be contrary to the public interest (s 36); certain documents arising out of companies and securities legislation (s 37); documents to which secrecy provisions of

⁴⁹⁷ Freedom of Information Regulations 2009 S.R. No. 33/2009 Section 5b

⁴⁹⁸ Freedom of Information Act 1982 (Vic)

enactments apply (s 38); council documents (s 38A) and disclosures where the processing of an application would be unduly burdensome.

Several types of exemptions, namely internal working documents (s 30); law enforcement documents (s 31); documents relating to trade secrets, etc. (s 34); documents containing material obtained in confidence (s 35); and exemptions where disclosure would be contrary to the public interest (s 36) are of important relevance to water utilities' regulation and, therefore, will be evaluated in detail.

However, before considering the exemption clauses in detail, it would be necessary to discuss the unique structure of the "public interest" test under the Victorian FoI Act. Unlike the English and the Indonesian FoI Acts, the Victorian FoI Act has two kinds of public interest clause. The first type is public interest test clauses that come together with FoI exemptions clauses, such as in sections 30, 34 (2) and 35 1 (b) as discussed above. In this type of exemption, the public body has the discretion to consider whether disclosure of a particular document would be in the public interest. The second type is a general public interest "override" in s.50(4). This clause is applicable to all exemptions, except for exemptions in sections 28, 31(3), and 33. The authority to evaluate exemptions rests not on a public body (or 'Agency', the term used in Victoria's FoI) but on the Tribunal, when a dispute occurs.

When arguing for an s.50(4) override, the onus of proof on the existence of a public interest in disclosure lies with the applicant.⁴⁹⁹ This runs contrary to the

⁴⁹⁹ Russell, E.W., Waterman, E. and Seddon, N., *Audit Review of Government Contracts: Contracting, Privatisation, Probity and Disclosure in Victoria 1992–1999, An Independent Report to Government*

ordinary public interest test which put the onus on the public authority in demonstrating that there is a public interest *not* to disclose such as in s.35 and 36. In cases where both types of public interest clauses applies, the Tribunal might be required to examine public interest twice⁵⁰⁰, in two stages, each having a different and competing idea: the first, the public interest in not disclosing the information argued by the public authority, and when this is confirmed, the second stage under s.50(4), the public interest for disclosing the information, argued by the applicant.

In *Department of Premier and Cabinet v Halls* the appeal court invoked the idea that public interests in the general exemption clauses (in ss.29-38) may wear different aspects with the public interest in s.50(4).⁵⁰¹ This means that whilst the Court may accept Public Interest arguments *for* maintaining the exemptions, the Court may still weigh different aspects of Public Interest which leads to disclosure.

4.5.2.1. Internal working documents (s.30)

This section exempts documents containing recommendations, advice, opinion, consultations or deliberations taking place among officers and ministers in the course of government processes. Disclosure of such documents is prohibited if it would be contrary to a public interest.

(State Government of Victoria, (May 2000), 2000)
<http://www.dpc.vic.gov.au/auditreview/1_main.pdf> November 10, 2010

⁵⁰⁰ Ibid

⁵⁰¹ *Department of Premier and Cabinet v Halls* Department of Premier and Cabinet v Halls [1999] VSCA 117 (11 August 1999) Supreme Court of Victoria - Court of Appeal para 27-30

The sentence in s.30 contains the conditional ‘if’ and the conjunction ‘and’.⁵⁰² Hence, non-disclosure would be triggered only when the two prerequisites are fulfilled: first, the document contains advice, recommendation, consultation or deliberation of the officials *and* secondly, that such disclosure is contrary to public interest. The burden of proof for arguing that there is a public interest for non-disclosure lies on the agencies. This provision does not contain a harm test.

The public interest which is often argued in favour of non-disclosure is the free and frank deliberation of government officers, as it is feared that without sufficient protection from disclosure, the quality of decisions arrived at by deliberation will decrease.⁵⁰³ However, this “candour and frankness” has been treated with scepticism.⁵⁰⁴ Only when an office is at a sufficiently high level where frankness and candour exist, is the exemption considered appropriate.⁵⁰⁵

4.5.2.2. Law enforcement documents (s.31)

Law enforcement documents are protected from disclosure. This exemption includes documents containing information on investigation of breach or possible breach of law, proper “administration of the law”, fair trial and fair adjudication,

⁵⁰² Freedom of Information Act 1982 (Vic) s.31

⁵⁰³ *Re News Corporation Limited, Mirror Newspapers Limited, Nationwide News Pty Limited and Control Investments Pty Limited and National Companies and Securities Commission* [1983] AATA 311; 8 Aclr 316 (14 September 1983) Administrative Appeals Tribunal

⁵⁰⁴ *Re Robyn Frances Murtagh and Commissioner of Taxation* [1984] AATA 249 (5 July 1984) *Re Howard and the Treasurer of the Commonwealth* (1985) 3 AAR 169 Department of Premier and Cabinet v Hulls

⁵⁰⁵ *Sankey v Whitlam* *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 (9 November 1978) High Court of Australia para 39

disclosure which may endanger the life of police informants and law enforcement officers and methods of crime prevention or law enforcement.⁵⁰⁶

The clause covers both ‘investigation of a breach or possible breach’ of the law and “proper administration of the law”. The latter has been argued to encompass “*something concerned with the process of the enforcement of legal rights or duties*” and covers both civil and criminal law.⁵⁰⁷ Investigation by the Ombudsman or any other regulatory bodies may be covered by this exemption, but the harm must be sufficiently argued if the exemption is to be granted.

4.5.2.3. Document relating to trade secrets and commercial information (s.34)

This section regulates two kinds of documents: documents obtained by the minister or agency from a third party and documents within an agency or ministry.

Documents acquired from a third party containing (a) trade secrets or (b) other business, commercial or financial information is protected from disclosure. However,

⁵⁰⁶ S. 31 (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to:

(a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;
(b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
(c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;

(d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or (e) endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.

⁵⁰⁷ Accident Compensation Commission v Croom [1991] VicRp 72; [1991] 2 VR 322 (24 September 1990)

exemptions under category (b) contain a further qualification, namely, that it must expose an undertaking to a disadvantage. Trade secret information (category (a)) is an absolute exemption since according to s.34 (2) the elements in weighing disclosure are applicable only to category (b).

In determining whether information may cause disadvantages to an undertaking, the Act lays down several elements, namely, whether the information is already generally available to competitors, whether it would be an exempt matter if it were generated by an agency and whether disclosure could be possible without causing substantial harm to the competitive position of an undertaking. Finally, there is a requirement to determine if there are any public interest considerations in favour of disclosure which outweigh considerations of competitive disadvantage. In order to qualify for exemption, information must have the “*essential quality or character of the matter business, commercial or financial*”.⁵⁰⁸

A harm test is applicable to this exemption and demonstrated through the use of the phrase “would be likely to expose the undertaking unreasonably to a disadvantage”.⁵⁰⁹ Reasonable expectation that a harm would exist is adequate. In *Re Actors' Equity Association*⁵¹⁰:

“The question is whether there is a reasonable expectation of adverse effect...[...]. What there must be is a foundation for a finding that there is an expectation of adverse effect that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely 'agreeable to

⁵⁰⁸ *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441

⁵⁰⁹ Freedom of Information Act 1982 (Vic) s.34 (1) b

⁵¹⁰ *Re Actors' Equity Association of Australia and Australian Consumers Association and Australian Broadcasting Tribunal and Federation of Australian Commercial Television Stations* [1985] AATA 69

reason; not irrational, absurd or ridiculous' (Shorter Oxford Dictionary). This is not very much to ask of evidence of an expectation of an adverse effect on a business."

*Attorney-General's Department v Cockcroft*⁵¹¹ is a leading authority and concludes that the harm tests:

"require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous [...]..... It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like..."

Subsequent decisions such as *Alan Sunderland v the Department of Defence*⁵¹², *Organon v Department of Community Services v Health and Public Interest Advocacy Centre*⁵¹³, *Queensland and Department of Aviation*⁵¹⁴ and *Maksimovic and Commonwealth Director of Public Prosecutions and Anor*⁵¹⁵ all refer to and reiterate *Cockcroft*. Hence, so long as a disclosure can be expected to cause negative consequences, it will fulfil the likelihood element, without needing much proof.

Goodwill can be categorised as a commercial interest and the loss of goodwill considered a form of 'harm' if it leads to the loss of the consumer. In one case

⁵¹¹ Re Peter Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Limited [1985] AATA 224

⁵¹² Re Alan Sunderland and the Department of Defence [1986] AATA 278 (19 September 1986)

⁵¹³ Re Organon (Australia) Pty Limited and Department of Community Services and Health and Public Interest Advocacy Centre [1987] AATA 396

⁵¹⁴ Re Queensland and Department of Aviation [1986] AATA 142

⁵¹⁵ Maksimovic and Commonwealth Director of Public Prosecutions and Anor [2009] AATA 700

invoking exemption under s.45(1)(c) of the Queensland's FoI Act, (equivalent to the Victorian FoI s.34(b) on the protection of commercial, business and personal interest) the Queensland FoI Commission decided that⁵¹⁶ *“adverse effect on a corporation's business reputation or goodwill [...] is feared ultimately for its potential to result in loss of income or profits, through loss of customers”*. Hence, a harm caused to a corporation could either be direct, in the form of decreasing profit, or indirect, such as in the form of goodwill which leads to the loss of customers and, eventually, profit. This would certainly be interesting if argued in a water utility context. More importantly, the FoI Commission considered whether the company is operating in a monopoly context which would influence its assessment of “harm”:

*“A relevant factor in this regard would be whether the agency or other person enjoys a monopoly position for the supply of particular goods or services in the relevant market (in which case it may be difficult to show that an adverse effect on the relevant business, commercial or financial affairs could reasonably be expected), or whether it operates in a commercially competitive environment in the relevant market.”*⁵¹⁷

If disclosures are to be made, the Ministers or relevant Agency should consult the third party in order to obtain their view on the planned disclosure. When the decision to disclose is made, they should notify the undertaking of their right to apply for a review towards such decision.

Documents of an agency containing (a) trade secrets or (b) other business, commercial or financial information the disclosure of which would expose the agency

⁵¹⁶ Cannon and Australian Quality Egg Farms Ltd [1994] QICmr 9; (1994) 1 QAR 491 (30 May 1994)

⁵¹⁷ Ibid para 84

to a disadvantage and (c) the results of scientific or technical research undertaken by an officer of an agency, which may either lead to a patentable invention; an incomplete research whose disclosure is at the disadvantage of a third party; incomplete results of a research whose disclosure will expose the agency or its officers at a disadvantage are also exempt under this section.⁵¹⁸

4.5.2.4. Material obtained in confidence (s.35)

Material obtained in confidence by an agency or a Minister is protected from disclosure.⁵¹⁹ The key feature of this clause is that the information must be communicated “in confidence” to an agency or a Minister. Section 35 excludes information acquired by an agency or a minister from a business, commercial or financial undertaking and that which relates to trade secrets or other matters of a business, commercial or financial nature, presumably as this has already been covered in s.34.

The Russell Report⁵²⁰ concludes that exemptions are deemed to apply only where information is submitted to the government in confidence (s.35) and not when the information is generated jointly between the government and a third party.⁵²¹ The Victorian Administrative and Appeals Tribunal Decision *Thwaites and MAS* emphasized:

⁵¹⁸ Freedom of Information Act 1982 s.34

⁵¹⁹ Freedom of Information Act 1982 (Vic) s.35

⁵²⁰ Russell, Waterman and Seddon, *Audit Review of Government Contracts: Contracting, Privatisation, Probity and Disclosure in Victoria 1992–1999, An Independent Report to Government*

⁵²¹ Similar condition applies to s.34 exemption

*“....the documents do not so much consist of information acquired by the agency from a business, commercial or financial undertaking but rather constitute the record of the transaction between the parties. Such documents, recording the agreement as to the arrangements between the parties, are, in effect, the contractual outcome of negotiations. However, at the same time, they contain information of a business, commercial or financial nature.”*⁵²²

Hence, if this interpretation is taken, any contracts between a government and a third party, such as the Victorian Desalination Contracts, will not fall under the exemptions provided in s.34 and s.35.

4.5.2.5. Other ‘general’ exemptions under s.36

The Victorian FoI Act contains another type of exemption (s.36) to protect governmental information from premature disclosure that would be reasonably likely to have a substantial adverse effect on the economy of Victoria. Some of the examples provided in the Act are movement of bank interest rate or sales tax, plan for credit controls, sale or acquisition of land or property by the Crown, urban re-zoning, formulation of land use and planning controls and the formulation of customs.⁵²³

The above class of protection contains three elements that need to be satisfied: “a premature disclosure”, “reasonably likely” and “substantial adverse effect”.⁵²⁴ The phrase ‘premature disclosure’ indicates a possibility that such a document could be released in the future. “Reasonably likely” is a phrase signifying causality between disclosure and its

⁵²² Thwaites V Met Ambulance Service (1995/04289) [1994] VICCAT 6 (3 May 1994). The Victorian Administrative and Appeals Tribunal is the former name of VCAT

⁵²³ Freedom of Information Act 1982 (Vic) s.36

⁵²⁴ Ibid s.36

effects. Finally, the phrase ‘substantial adverse effect’ is the presumed harm effect of a disclosure.

Another type of disclosure that is deemed to be contrary to the public interest is the disclosure of documents containing information on instructions or guidelines for officers or agencies to be used in negotiation, including financial, commercial and labour negotiation, the execution of contracts, the defence, prosecution and settlement of cases, financial property, personnel management and assessment interests of the Crown or of an agency.⁵²⁵

4.6. Chapter Conclusion

This chapter starts by reviewing the legal and institutional framework regulating Victoria’s water utilities. Victoria’s utilities are state owned and there is constitutional “entrenchment” to ensure that its water utilities remain publicly owned. PSP, however, is not prohibited. There are no rules limiting the extent and breadth of private sector involvement in the water services sector, hence, any PSP model which does not alter the public authority’s status and accountability line to the government will be allowed. This is a weakness that needs to be addressed in future reform as certain PSP models such as concession can have far reaching consequences towards democratic goals.

The Victorian procurement policy can be a good example of a high degree of integration between active and passive disclosure rules. The procurement policy

⁵²⁵ Freedom of Information Act 1982 s.36

enables the Victorian FoI to be enforced and confidentiality clauses in PSP contracts to be addressed and the contract documents itself published through the Contract Publication System (CPS). As mentioned in Chapter 1, a confidentiality clause creates transparency problems in various countries but Victoria seems to be able to manage it well, although there are still some compliance problems. In terms of regulatory decision making, the regulatory system in Victoria developed fairly well, although, as will be discussed in the next chapter, England is much more advanced. The Regulator's disclosure policy in Victoria lays emphasis only in certain issues relating to utilities' performance and pricing. There are no discretionary powers for the Regulator to independently disclose information.

In terms of utilities corporate governance, there are adequate transparency frameworks in terms of corporate structure and board accountability. Regulation on related party transaction, however, is very minimal, especially if compared to England, as will be discussed in the next chapter. Normatively speaking, there are no requirements for Victorian water utilities to disclose their related party transactions. Such information must be submitted to the regulator as part of the regulatory account submission but disclosure by ESC is prohibited. Recent Australian Accounting Standards Board (AASB) rules also exempt government entities from the requirement of disclosing related party transactions. Interestingly, Victorian water utilities decide to continuously invoke the former AASB rules. Hence, this information remained published.

Finally, the Victorian FoI Act is applicable to all water institutions, except Aquasure and EWOV, as they are both private entities. This reinforces the arguments that the "privatisation" of government services decreases transparency, in terms of "passive" disclosure rules. The relationship between monopoly position and disclosure has not been addressed in Victorian Case Law, but one case in Queensland

creates a precedent which treats an entity's disclosure threshold in accordance with its monopoly power. However, the case does not pertain to a water utility in particular and the discussions on the relationship between monopoly and disclosure were not the dominant feature of the case. All findings in this chapter are summarised in a comparative form in **Annex I**.

The next section will discuss England, which has a more advanced regulatory system than Victoria. Differing from Victoria, whose utilities are state-owned, English utilities are fully divested. It would, therefore, be interesting to test the hypothesis of whether private sector participation will necessarily lead to the decrease of transparency.

5. ENGLAND

5.1. Overview of the Legal and Institutional Framework

The United Kingdom of Great Britain and Northern Ireland is a unitary state between four countries comprising England, Wales, Scotland and Northern Ireland. Each of these countries has a different legal system. Northern Ireland, Wales and Scotland have their own legislatures but with a different degree of devolved powers. England has no sub-national parliament of its own and falls directly under Westminster's legislative authority. Each of these countries has their own model for the governance of water services. This thesis only focuses on England, and also to a certain extent Wales, as their water companies are both regulated by the same economic regulator, the Water Services Regulation Authority (OFWAT).

Water services in England have undergone several institutional changes throughout history. During the period 1750-1870, water services were provided mostly by the private sector following the *laissez-faire* principle where state intervention has to be minimized.⁵²⁶ Realizing that this was not successful, the Government enacted an Act to control the private companies.⁵²⁷ By 1875, local authorities were required to ensure adequate water supplies in their areas, if necessary, by acquiring privately-owned networks, which led to the remunicipalisation

⁵²⁶ Bakker, K.J., *An uncooperative commodity: Privatizing water in England and Wales* (Oxford University Press, USA 2003) p. 46-49

⁵²⁷ Ibid p.48 The act, accompanied by modifications in local legislations, was largely technical, containing measures for the undertaker's financial control and operational mechanisms for the laying of mains although there was also a duty to connect to all houses in a street where a main was laid. See Hassan, J., *A history of water in modern England and Wales* (Manchester University Press : Distributed in the USA by St. Martin's Press 1998) p. 17

movement until 1945.⁵²⁸ In 1973 the government consolidated and then regionalised all municipal water services into 10 Regional Water Authorities (RWA) which took over the responsibility of 157 water undertakings, 29 river authorities and 1,393 sanitary authorities, along with the principles of Integrated Water Resources Management.⁵²⁹ However, the regionalisation process was perceived as a failure and the RWAs were deemed not able to protect environmental and potable water qualities. By this time, the EC had begun enacting various legislations on water qualities, notably the bathing and drinking water directives,⁵³⁰ as well as enforcing them against the UK.⁵³¹ The politicisation of the environment, serious enforcement effort by the EC, the perceived failure of the RWAs and a conservative approach to market liberalism all provided a background to water privatisation.⁵³² A discussion paper was issued in 1986 paving the way for the privatisation and, in 1987, the Conservative government who had previously privatised other utilities (British Gas in 1986 and British Telecom in 1984) returned to power and proceeded with its previous plan to privatise the water industry.⁵³³

⁵²⁸ Hassan, *A history of water in modern England and Wales* p.18

⁵²⁹ Ibid p. 126

⁵³⁰ Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, Official Journal L 031 , 05/02/1976 P. 0001 - 0007 and Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, Official Journal L 229 , 30/08/1980 P. 0011 - 0029

⁵³¹ See Case C-56/90, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland - Directive 76/160/EEC - Bathing water, European Court reports 1993 Page I-04109

⁵³² See generally Hassan, *A history of water in modern England and Wales* and Bakker, *An uncooperative commodity: Privatizing water in England and Wales*

⁵³³ Ofwat and Defra, 'The Development of Water Industry in England and Wales' <<http://www.ofwat.gov.uk/content?id=55ec1308-4f56-11de-8387-6dfad2269788>>

Full divestiture of the 10 RWAs (with minimal enterprise or managerial reorganization) – and not a long-term contract model such as concession – was opted for as the method of privatisation.⁵³⁴ The 1989 Water Act was the privatising legislation which also sets the foundation for post-“privatisation” regulatory architecture. The RWAs are converted into water services companies and their former river basin management duties and consumer protection duties are transferred, respectively, to the newly established National River Authorities and the Office of Water Services (OFWAT).⁵³⁵ Other than statutes and secondary laws, licences are used as the main regulatory instrument. The post-divestiture regulatory architecture is thus far much more complicated than the previous publicly-owned arrangements. The government’s desire to remove water infrastructure financing from the public budget led to the inevitable creation of powerful monopolies. If the regulatory arrangements malfunction the political and economic cost would be dire and, as a consequence, a complex regulatory system would be required to safeguard the public interest.⁵³⁶

It is generally agreed that, at least, there are three key regulatory actors in the English water industry: the drinking water quality regulator, the environmental regulator and the economic regulator.⁵³⁷ Drinking Water Quality is regulated by the

⁵³⁴ According to Hassan, this was due to (i) the lack of compelling evidence in support franchising at that time (ii) the fact that franchising will preserve public institutions, something that would be contrary to the Conservative government’s political aspirations and (iii) that the government was expecting a successful flotation and this would have less chance if franchising was opted. See Hassan, *A history of water in modern England and Wales* p.169

⁵³⁵ Ibid p. 170 The transfer of river basin management and environmental duties to the NRA was a result of long parliamentary scrutinies.

⁵³⁶ Ibid p. 170

⁵³⁷ Hendry, ‘An Analytical Framework for Reform of National Water Law’ also Quesada, *Water and Sanitation Services in Europe: Do Legal Frameworks provide for “Good Governance”?* Hassan, *A*

Drinking Water Inspectorate (DWI) while the NRA and OFWAT are, respectively, the economic and environmental regulators. This structure was changed in 1995 where the NRA was incorporated into the Environmental Agency.

5.2. England's Water Businesses

There are 10 Water and Sewerage Companies (WaSC) and 12 Water Only Companies (WOC) in England and Wales. There is a variation of form of legal entities among the water businesses. At the time of writing, of all the 10 WaSCs, only one is a Public Limited Company (Plc), United Utilities, and one, Welsh Water, is a company limited by guarantee, whereas the rest are privately held companies (Ltd). Meanwhile, the 12 WOCs are either Plcs or Ltds.

Table 4: Water Companies in England and Wales

Water and Sewerage Companies	Water Only Companies
Anglian Water Services Ltd	Bristol Water plc
Northumbrian Water Ltd	Bournemouth & West Hampshire
Severn Trent Water Ltd	Cambridge Water plc
South West Water Services	Dee Valley Water plc
Southern Water Services	Cholderton & District Water Co Ltd

history of water in modern England and Wales p. 180 Bakker identified at least 8 regulators at the EU, national and regional levels: The European Community taking the role in standard setting; the Environment Agency as the Environmental Regulator; the OFWAT as the Economic Regulator, DEFRA tasked with standard setting, appointment of regulators and special permits; DWI as the water quality regulator, Competition Commission in charge of reporting and appeals; Environment Agency (Regional) Tribunals on abstraction/discharge licenses as well as monitoring and OFWAT's Customer Service Committee (Regional) for settling matters on customer complaints, service standards disputes and compensations.

Thames Water Utilities Ltd	Portsmouth Water plc
United Utilities Water plc	South East Water plc (including Mid
Dŵr Cymru Cyfyngedig	South Staffordshire Water plc
Wessex Water Services Ltd	Sutton & East Surrey Water plc
Yorkshire Water Services	Veolia Water Central Ltd
Ltd	Veolia Water East Ltd
	Veolia Water Southeast Ltd

5.2.1. Sectoral rules and regulatory institutions overseeing England’s water businesses

5.2.1.1. The Water Services Regulation Authority (OFWAT)

The Water Services Regulation Authority (now the statutory name of OFWAT) is a non-ministerial government department established in 1989. The Water Act 1989 which was also the privatising legislation for water services in England and Wales sets the duties, rights and responsibilities of the Director General of Water Services⁵³⁸ and authorises the Director to arrange and appoint staff and delegate responsibilities to his staff.⁵³⁹ The Water Act 2003 abolished the office of Director General of Water Services⁵⁴⁰ and replaced⁵⁴¹ the role of the single director of OFWAT with a board⁵⁴², bearing the name “Water Services Regulation Authority”. The replacement of the Director General with a regulatory board is consistent with the

⁵³⁸ Water Act 1989 c.15 for example, Sections 5 and 7

⁵³⁹ Ibid Schedule 3 of the Original version, s.5 para 1-4

⁵⁴⁰ Water Act 2003 c.37 s.34 (3)s.34 (3)

⁵⁴¹ Ibid c.56 with s.1A

⁵⁴² Ibid schedule 1, s.1(1) “*The Authority shall consist of a chairman, and at least two other members, appointed by the Secretary of State*”

UK's best practice on regulation⁵⁴³ and has been conducted in other utilities. After the 2003 amendments, the Water Services Regulation Authority continues to use the name OFWAT.

The primary duties of OFWAT (and the Secretary of State) under the original WIA 1991 were to ensure that the undertakers are able to perform their functions and that they are able to secure reasonable return on their capital⁵⁴⁴ and its secondary duties are to protect consumers' interests, promote efficiency and facilitate competition.⁵⁴⁵ With the ascent of the Labour government to power, these were later amended (in force in 2005) by the 2003 Water Act, making the furtherance of the consumer objective a first duty, followed by the duties to ensure that undertakers are able to carry out their functions properly, duties to ensure reasonable returns on capital and duties to enforce licence conditions.⁵⁴⁶ However, the duty to further the consumer objective should be achieved "*wherever appropriate by promoting effective competition*".⁵⁴⁷

OFWAT regulates water companies through licences. As discussed above, it has the duty to ensure that licence conditions are met by the companies. In performing

⁵⁴³ See Hendry, 'An Analytical Framework for Reform of National Water Law' p.304

⁵⁴⁴ Water Industry Act 1991 (England) s.2 (2)

⁵⁴⁵ Ibid s.2 (3)

⁵⁴⁶ Water Act 2003 c.37 ss. 39(3), 105(3); S.I. 2005/968, art. 2(f)

⁵⁴⁷ Competition can be achieved through awarding of licences, inset appointments; cross-border supplies; private supplies; and in providing new mains and service pipes. See Ofwat and Defra, 'The Development of Water Industry in England and Wales' p. 98. The Cave report seeks to widen competition in the water industry more than just these five factors Cave, M., *Independent review of competition and innovation in water markets: final report* (Department for Environment Food and Rural Affairs (Defra), 2009)

this task, OFWAT is equipped with the power to impose sanctions to water companies.

OFWAT uses the price cap as the instrument of economic regulation. By capping prices (and not dividends) water companies are expected to be able to boost performance by increasing efficiency. The cost-efficiency savings as a result of the company's performance can then be credited back to the company while at the same time used as a factor in price reduction.⁵⁴⁸ The price cap⁵⁴⁹ is embedded in each water company's Licence Condition 'B' (regarding Charges)⁵⁵⁰ and is reviewed once every five years (initially it was planned for a 10 year review). Utilities are required to submit regulatory information annually as specified by OFWAT, known as the "June Return". This June Return is the primary information input for OFWAT. Through

⁵⁴⁸ King, S., 'Principles of price cap regulation' in Margaret Arblaster and Mark Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (ACCC and PURC 1998)

⁵⁴⁹ The general formula is $RPI-X$, whereas RPI is the retail price index and X is the efficiency factor. The RPI (or consumer price index in US) is chosen as it reflects the inflation (or deflation) rate of the price. Water industry uses K factor, instead of a plain X, in order to incorporate water quality requirements from the EC and network expansions, whereas $K=-X+Q$ with X signifying efficiency factor and Q the cost of higher water quality requirement. See Green, R., 'Has price cap regulation of UK utilities been a success?' 132 *Public Policy for the Private Sector*. In the second periodic review of 2000-2005, OFWAT set a new general formulation of the K factor of $-P0 - X + Q \pm V \pm S$, whereas P0 is the initial reduction in prices resulting from out-performance in the period before, X is the expression of efficiency in the next period, Q reflects the cost of higher demand of drinking quality (due to EC Directives), V represents the impact of the supply/demand balance (The V value can be positive if new resources are required or expansion should be made and negative if companies have an abundance of resources and can sell their surplus) and finally S represents the service factor (The S value could either result in enhancement [+] or a controlled reduction in standards [-]). During this second periodic review, OFWAT was under pressure for a lower price amid the regulatory demand for higher water quality and possible network expansion. The only way for this was to push the companies to be more efficient (making the -X value to be greater or at least equal to the $+ Q \pm V \pm S$ values). See Booker, A., 'Incentive regulation in water - case study' (Utility Regulation Training Program) <<http://www.regulationbodyofknowledge.org/documents/155.pdf>> accessed April 10, 2011

⁵⁵⁰ The Licence Conditions are imposed by OFWAT under the authority provided Water Industry Act 1991 (England) s.11

this, OFWAT compare water companies' cost information and then use it to determine the K factor in its price cap formula ("yardstick competition"). The allowed price cap is thus determined using the industry's average unit cost.⁵⁵¹ Yardstick competition, the combination of the authority to impose sanctions and award a favourable K factor that would allow the companies to recoup its profit, serves as the carrot-and-stick of the English regulatory system.

The 2003 Water Act also inserted new principles of emerging regulatory practice, by requiring that OFWAT "*shall have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed)*".⁵⁵² Since there is no other provision in the WIA 1991 which elaborate the elements of 'best regulatory practice' above in more detail, the provision above entails no direct practical legal consequences to OFWAT. Having said that, the principles of "better regulation" are practiced by OFWAT and its elements are well-reflected in its policies. This will be elaborated in the preceding sections.

5.2.1.2. Environment Agency

⁵⁵¹ Bernstein, J.L., 'Price cap regulation and productivity growth' 1 International Productivity Monitor 23

⁵⁵² Water Industry Act 1991 (England) s 2 (4) as amended by Water Act 2003 c.37 ss. 39(4). On "Better Regulation" and its evolution see Better Regulation Executive, 'Better Regulation' (*Department for Business Innovation and Skills*, 2008) <<http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/whatwedo/bre/index.html/index.html>> accessed May 21st, 2012 Better Regulation Task Force, *Regulation-Less is More. Reducing Burdens, Improving Outcomes* (London: Cabinet Office, 2005) Baldwin, R., 'Regulation lite: the rise of emissions trading' 2 Regulation & Governance 193

The Environment Agency (EA) is a result of consolidation⁵⁵³ of several regulatory bodies: the NRA, Her Majesty's Inspectorate of Pollution (HMIP) and the Waste Regulation Authorities. The purpose of the consolidation was to provide an integrated approach to environmental protection by combining the regulatory authority on land, air and water in a single body.⁵⁵⁴

The EA is one of the most important actors in the regulation of the English water industry since it is tasked with the control of pollution⁵⁵⁵ and the management and conservation of water resources,⁵⁵⁶ both of which are factors influencing water charges imposed on consumers and the company's investment decisions. The Environment Act 1995 specifically clarified that the EA's function of protection against pollution shall include the protection of any waters – surface or underground – from which any water undertaker is authorised to take water.⁵⁵⁷

The EA issues abstraction licences and discharges permits to the water companies. The Water Resources Act (WRA) 1991 specifies the types, form and content of licences, the mechanism for applying them, the rights and obligations attached to the licence, the right to appeal against licensing decisions and matters pertaining to modification of licences.⁵⁵⁸ Abstractions are charged on a cost-recovery

⁵⁵³ Environment Act 1995 c.25 s.2

⁵⁵⁴ Ofwat and Defra, 'The Development of Water Industry in England and Wales' p.9

⁵⁵⁵ Environment Act 1995 c.25s.5

⁵⁵⁶ Ibid s.6

⁵⁵⁷ Ibid s.10

⁵⁵⁸ Water Resources Act 1991 c.57 s.36A, s46, s34-38, s.40, s43-45, s.51-59

basis. The EA has the power to prosecute water companies who are in breach of their licence condition or cause pollution.⁵⁵⁹

Discharge consents⁵⁶⁰ are regulated in the WRA which also stipulates that the EA may impose consent conditions.⁵⁶¹ If water companies are in breach of consent conditions, the EA will send an enforcement notice to the companies specifying the contravention or potential contravention. If the enforcement notice is not complied with, a criminal and/or financial penalty follows.⁵⁶² Companies must submit a 25-year water resources plan which the EA will review.

5.2.1.3. Drinking Water Inspectorate

The Drinking Water Inspectorate (DWI) monitors and supervises tap water quality distributed by water companies in England and Wales. The DWI was set up in 1990 through the 1989 Water Act.⁵⁶³ The organisation conducts technical audits of water companies, assesses their sampling programmes and investigates consumer complaints and water quality incidents.⁵⁶⁴ The DWI also liaises with OFWAT for its periodic reviews.⁵⁶⁵

⁵⁵⁹ Ofwat and Defra, 'The Development of Water Industry in England and Wales' p.50

⁵⁶⁰ Water Resources Act 1991 c.57ss. 88-90

⁵⁶¹ Ibid s. 90A

⁵⁶² Ibid s. 90B

⁵⁶³ Water Industry Act 1991 (England) s.86

⁵⁶⁴ DWI, 'About Us' (*Drinking Water Inspectorate UK*) <<http://dwi.defra.gov.uk/about/index.htm>> accessed April 20th 2010

⁵⁶⁵ Ibid

The WIA 1991 and WA 2003 amend and add more authority to the DWI in conducting its tasks.⁵⁶⁶ The DWI's Chief Inspector of Drinking Water is appointed by the Secretary of State for Environment, Food and Rural Affairs but operates independently from DEFRA.

European legislation sets the basic standards for English drinking water quality regulation and this is empowered by the WIA 1991, WA 2003 and implemented in several statutory instruments.⁵⁶⁷ The WIA empowers the Secretary of State to require the water companies to publish information about the quality of water supplied by them.⁵⁶⁸ The DWI has the power to investigate⁵⁶⁹ the possible contravention of water company's duties⁵⁷⁰ with respect to drinking water quality and, on the other hand, the water companies have legal obligations to assist the inspector and provide him with all information as may be required to perform investigation.⁵⁷¹

5.2.1.4. Consumer Council for Water

The Consumer Council for Water is a statutory body whose task is to represent consumers' interests in the English water industry, primarily by taking complaints and investigating them against the water industry. The body originated

⁵⁶⁶ The original WIA 1991 refers to the organisation as 'technical assessors'. See, for example, the original Water Industry Act 1991 (England) s 86. Water Act 2003 repealed the term and directly referred to the 'Chief Inspector of Drinking Water'. See also Hendry, 'An Analytical Framework for Reform of National Water Law' p.329

⁵⁶⁷ This is primarily set on the EC Drinking Water Directive Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, O.J. 330 p.32-54

⁵⁶⁸ Water Industry Act 1991 (England) s. 69 (5) and (6)

⁵⁶⁹ *Ibids.* 86 (1B) (a)

⁵⁷⁰ *Ibid* The duties of the water undertakers with respect to water quality are laid down under ss. 68, 69 and 79

⁵⁷¹ *Ibid* s. 86 (3)

from the regional “Customer Services Committee” (CSC) created at the beginning of the privatisation through the 1989 Water Act and further reinforced by the 1991 Water Industry Act.⁵⁷² Originally, the CSCs were established at every water companies and were structurally a part of OFWAT.⁵⁷³ This changed when the 2003 Water Act abolished the CSCs and established the “Consumer Council for Water” (CC Water) with a separate structure from OFWAT.

The Water Act 2003 provides CC Water with wide authority and responsibilities. The authority includes the power to require OFWAT or water companies to supply it with information⁵⁷⁴ and to investigate complaints.⁵⁷⁵

5.2.1.5. Competition Commission

Formerly the “Monopolies and Mergers Commission” but changed to the “Competition Commission” by the 2002 Enterprise Act⁵⁷⁶, the Commission is an independent statutory body tasked with supervising mergers, utilities’ regulation and ensuring healthy competition between business actors in the UK.

The WIA 1991 tasked the Office of Fair Trading (OFT) with referring water companies’ mergers to the Commission⁵⁷⁷, except if they are considered as ‘small

⁵⁷² Water Act 1989 c.15 s.6 and Water Industry Act 1991 (England) ss.28-29

⁵⁷³ The preamble of the 1989 Water Act states: “*An [A.D. 1989.] Act to ... provide for the appointment and functions of a Director General of Water Services and of customer service committees;...*”

⁵⁷⁴ Water Industry Act 1991 (England) s 27h as amended by WA 2003 s.44

⁵⁷⁵ Ibid s.29A

⁵⁷⁶ Enterprise Act 2002, 2002 c.40

⁵⁷⁷ Water Industry Act 1991 (England) s. 32. Among the consideration made by the CC(?) is whether the merger will hinder OFWAT’s task in comparing different water enterprises against benefits of the

mergers’.⁵⁷⁸ The OFT and OFWAT have concurrent⁵⁷⁹ jurisdiction with respect to investigation and enforcement agreements between undertakings, decisions or concerted practices which may affect trade or with the objectives or effect in preventing, restricting or distorting competition⁵⁸⁰ or constitute an “abuse of dominant position”.⁵⁸¹

5.2.1.6. DEFRA

The Department for Environment, Food and Rural Affairs (DEFRA) – chaired by the Secretary for the Environment, Food and Rural Affairs – has wide powers in creating policies for the water industry and the environment.

DEFRA is involved in standard setting, drafting legislation, policy making and in the appointment of OFWAT officers.⁵⁸² Although OFWAT is independent in performing its tasks and is directly accountable to parliament, DEFRA continues to supervise OFWAT’s work.

Recently, DEFRA announced an OFWAT review, with the purpose of examining “*how the industry regulator works, whether it offers good value for money*

merger to consumer. See schedule 4ZA of *ibid* 991. See also Hendry, ‘An Analytical Framework for Reform of National Water Law’ p. 359

⁵⁷⁸Water Industry Act 1991 (England) s.33

⁵⁷⁹*Ibid* s 31 as amended by Competition Act 1998 c 41 s 5 (6). S 31 of the Water Industry Act 1991 (England) also empowers OFWAT, concurrently with the OFT, to investigate directly violation of EC Treaty Articles 81(1) and 82. The concurrent jurisdiction is also enabled by the Enterprise Act 2002, 2002 c.40

⁵⁸⁰ Competition Act 1998 c 41 s2.1 and Water Industry Act 1991 (England) s 31 (3) (a)

⁵⁸¹ Competition Act 1998 c 41 s 18 and Water Industry Act 1991 (England) s 31 (3) (b)

⁵⁸² “*The Authority shall consist of a chairman, and at least two other members, appointed by the Secretary of State*”. Water Industry Act 1991 (England) Schedule 1A, para 1 (1) see also Bakker, *An uncooperative commodity: Privatizing water in England and Wales* p.71

and if it is delivering what the Government and customers expect”.⁵⁸³ DEFRA had carried out an online survey which feeds in to its “Water White Paper”.⁵⁸⁴ As far as water services are involved, The Water White Paper simply incorporates recommendations from the Cave, Walker and Gray reports⁵⁸⁵ which will be referred to below. The next section will elaborate the implication of the re-regulation strategy of the English water industry.

Table 5: Recapitulation of sectoral rules and regulatory institutions

Institution	Function	Enabling Rules
OFWAT	Regulation of the water industry in general: price setting, consumer protection, competition	Water Act 1989 Water Industry Act 1991 Licence Condition
Environment Agency	Pollution control, management and conservation of water resources, issuance of abstraction licence and discharge permits	Water Resources Act 1991 Environment Act 1995
Drinking Water Inspectorate	Water quality regulator, technical audit on water companies, investigating	Water Industry Act 1991

⁵⁸³ ‘Ofwat review will consider future challenges facing industry’ (*Department for Environment Food and Rural Affairs*,) <<http://www.defra.gov.uk/news/2010/08/26/ofwat-review/>> accessed April 25, 2011

⁵⁸⁴ Department for Environment Food and Rural Affairs, ‘Water White Paper’ (DEFRA) <<http://www.official-documents.gov.uk/document/cm82/8230/8230.pdf>> accessed February 16, 2011

⁵⁸⁵ Walker, A., *The independent review of charging for household water and sewerage services : final report* (Department for Environment Food and Rural Affairs, 2009) Cave, *Independent review of competition and innovation in water markets: final report* Gray, D., *Review of Ofwat and consumer representation in the water sector* (Defra and the Welsh Government, 2011) <<http://www.defra.gov.uk/publications/files/ofwat-review-2011.pdf>> accessed July 26, 2011

	consumer complaints and water quality incidents	
Consumer Council for Water	Representing consumers' interests, taking complaints, investigating water industry on consumer complaints	Water Act 1989 Water Industry Act 1991 Water Act 2003
Competition Commission	Accepting referrals on merger issues, adjudicating breaches of competition law concurrently with OFWAT	Water Industry Act 1991 Competition Act 1998 Enterprise Act 2002
Department of Environment, Food and Rural Affairs	Standard setting, drafting of legislations and policies, appointment of regulators, industry restructuring	Water Act 1989 Water Resources Act 1991 Water Industry Act 1991 Environment Act 1995 Water Act 2003

5.2.2. Further re-regulation of the English water industry

DEFRA has recently commissioned several reviews of the English water industry. An independent review was carried out recently by Martin Cave on competition and innovation in the water industry.⁵⁸⁶ Another review on charging for household water and sewerage services was led by OFRAIL's chair Anna Walker.⁵⁸⁷ Finally, DEFRA also conducted a review of OFWAT and e CC Water, led by David Gray.⁵⁸⁸

⁵⁸⁶ Cave, *Independent review of competition and innovation in water markets: final report* note ⁵⁴⁷ above

⁵⁸⁷ Walker, *The independent review of charging for household water and sewerage services : final report*

⁵⁸⁸ Gray, *Review of Ofwat and consumer representation in the water sector*

Part of the coalition government's programme is to "*examine the conclusions of the Cave and Walker Reviews, and reform the water industry to ensure more efficient use of water and the protection of poorer households*".⁵⁸⁹ Meanwhile, OFWAT's review of terms of reference includes, among others, how effectively the statutory duties and guidance are translated through OFWAT's decision making; the effectiveness of the present governance system involving OFWAT and the Consumer Council for Water, in protecting water consumers and ensuring that their views influence the way the water sector is managed and regulated; value for money in regulation, particularly in comparison with other economic regulators and OFWAT's approach to minimising the burdens from its regulatory activity.⁵⁹⁰ Gray's OFWAT review, however, confirms that there would be no significant changes to the structure of the water industry and, therefore, both OFWAT and CC Water are to be retained.⁵⁹¹ The most important part of the Gray review is probably its call to reduce the regulatory burden and to induce "positive" incentives. Gray was of the opinion that at the moment OFWAT is focusing too much on negative incentives in the form of penalties and compliance mechanisms. At the same time, he felt that that the regulatory burden is too excessive.⁵⁹² Gray's review appears to go along with a previous report from Harris, which also calls for the reduction of regulatory burdens and incentivisation of companies with good track records of reporting and

⁵⁸⁹ Cameron, D. and Clegg, N., *The Coalition:our programme for government* (2010) <<http://www.cabinetoffice.gov.uk/news/coalition-documents>> April 25, 2011 p.17

⁵⁹⁰ United Kingdom, *Review of Ofwat -- Terms of Reference* (2010) <<http://www.defra.gov.uk/news/files/2010/08/ofwat-review-tor.pdf>> accessed April 25, 2011

⁵⁹¹ Gray, *Review of Ofwat and consumer representation in the water sector*

⁵⁹² Ibid

complying.⁵⁹³ The Harris report calls for a reduction in the information requirement and to focus information gathering on material issues related to prices and service levels.⁵⁹⁴ The future of the English water industry will thus be marked with the move towards utilities' self-regulation and a "risk-based" approach to compliance mechanisms. This pressure towards loosening the regulatory grip is well reflected in OFWAT's recent consultation which outlines that the practical implication of this is that OFWAT will reduce its information requirement, such as the June Return.⁵⁹⁵ This move may have significant implications for the quantity of information available in the public domain.

The Cave review's recommendations can be grouped into three general categories⁵⁹⁶: (i) the increasing use of market-like instruments, (ii) the introduction of competition for the market in the supplies of treated water through either an independent procurement entity or a single buyer and (iii) competition in the market, achieved through common carriage, starting from retail and extending to competition in the abstraction and treatment markets or contracting between suppliers, retailers and large customers. Cave has indicated that some of these reforms will require modification of primary legislation, such as that dealing with retail competition (in

⁵⁹³ Harris, K., *Improving regulatory reporting and compliance* (Report for Ofwat, 2010) <http://www.ofwat.gov.uk/publications/commissioned/rpt_com_20101020reporting.pdf> accessed December 3, 2011

⁵⁹⁴ Ibid

⁵⁹⁵ Ofwat, *Regulatory compliance – a proportionate and targeted approach, A consultation* (2011) <<http://www.ofwat.gov.uk/content?id=f956a963-ef60-11e0-bef5-b560843f3a7f>> accessed, January 1, 2012

⁵⁹⁶ Cave, M. and Wright, J., 'A strategy for introducing competition in the water sector' 18 *Utilities Policy* 116

order to change the existing avoidant cost into full economic cost)⁵⁹⁷ and in applying different pricing for abstraction and discharge depending on each geographical context⁵⁹⁸, to change the merger regime as well as regulating inset appointment and network expansions.⁵⁹⁹ The rest of Cave's proposals can be dealt with in regulations below primary legislation or in policies.

In many aspects, the Cave review calls for more transparency in the water sector. Cave calls for the publication of trade prices⁶⁰⁰ which is required for the trading of abstraction licences and discharge consents in order to reduce the barriers to trading.⁶⁰¹ However, this is probably more of an issue for water resources dealt by the EA, rather than OFWAT.

Cave also calls for more transparency in the merger system. In his view, the current merger system lacks ex-ante transparency with respect to OFWAT's methodology in assessing the impact of potential mergers to the loss of comparators,⁶⁰² whereas mergers could actually benefit consumers and the

⁵⁹⁷ The avoidant cost is currently enabled by Water Industry Act 1991 (England) ss 66D (3) and 66E. If full economic costs are to be applied, these provisions will need amendments

⁵⁹⁸ See also Cave and Wright, 'A strategy for introducing competition in the water sector'

⁵⁹⁹ Ibid

⁶⁰⁰ See p. 34. According to Cave: "Market prices are more likely to reflect the value(s) of water to users than an administrative approach to pricing. Markets need information to function properly. Trading can be facilitated further by providing more information to the market by publishing trade prices – this will indicate the value of licences in trade and encourage participation in the market." (p. 42). He continued: "To achieve this, legislation should enable the Environment Agency to collect and publish trade prices to provide greater information to traders about the potential value of licences (p.116, 'Recommendation Three') Cave, Independent review of competition and innovation in water markets: final report

⁶⁰¹ One of the barriers to liberalisation on the upstream (bulk water supply) level is information asymmetry between incumbent utilities and entrants. Entrants have – in Cave terms -- "...little information on which to decide whether, where and how to enter" ibid p.46

⁶⁰² Ibid p.95

environment. This will need to be reformed in the future, by requiring OFWAT to publish its methodology.⁶⁰³

Another implication of the liberalisation of the English water industry to transparency is with respect to common carriage and its access pricing. As discussed, Cave maintained that the current access pricing system using cost avoidance principles will need to be changed into full economic cost. This entails that the incumbent's cost structure itself will have to be transparent, and that the charging of access prices to new entrants will not be discriminatory. Cave recommends that indicative long-run marginal prices for the wholesale supply of water and waste water services at a water resource zone level and transport costs should be based on a common methodology and published.⁶⁰⁴

5.3. Regulatory Decision Making

5.3.1. Licences

Following divestiture, the ten water and sewerage companies (see **Table 4**) are provided with licences by the Secretary of State and OFWAT. As the English divestiture appoints those companies as regional monopolists and England and Wales have reached almost full coverage, no other licences for an entirely new, large-scale *greenfield* project are possible. Nevertheless, the WIA does provide scope for the

⁶⁰³ Ibid p. 89 He explained: “*The benefits of a transparent assessment methodology are in giving merging parties much greater regulatory certainty about the criteria, weightings and methodology that OFWAT would use in the evidence that it submits to the Competition Commission*”. p. 91

⁶⁰⁴ Ibid p. 54

development of small *greenfield* projects and this is translated by OFWAT through its New Appointment and Variations (NAV) policy.

Thus, there are three types of licences in the English regulatory system⁶⁰⁵: the original “undertaker” licences (owners of the main network assets of post 1989 divestitures),⁶⁰⁶ NAV licences awarded to a particular area and require variation of the aforementioned undertaker’s licence⁶⁰⁷ and water supply licences (WSL) which consisted of either a combined licence or a retail licence containing third party access authorisation to an undertaker’s network.⁶⁰⁸ Previously, the NAVs’ regime was known as “inset appointment” but OFWAT chose to drop the term to signify that the new appointees have similar obligations with already established undertakers.⁶⁰⁹ Thus the original undertakers’ and NAVs’ licence conditions are essentially the same.

Section 4.3.1 will compare the transparency of the undertaker/NAVs and WSL type of licences. However, the next sections will refer solely to undertakers’ licences as this is the type of licence which currently serves the majority of the English and Welsh populations.

5.3.1.1. Criteria for approval

Undertaker’s and NAV licences

⁶⁰⁵ See Hendry, ‘An Analytical Framework for Reform of National Water Law’ p. 303-309 (section 5.2.3) for another detail account of the licencing regime in England

⁶⁰⁶ This is regulated primarily by ss. 6, 7, 11 and 12 of the Water Industry Act 1991 (England)

⁶⁰⁷ Ibid. This is regulated primarily by ss. 6, 7, 11 and 12 of the *ibid*

⁶⁰⁸ This is granted under s. 17 F *ibid*.

⁶⁰⁹ *New appointments and variations – a consultation on our process* (Ofwat March, 2010)

The rule on the appointment of an undertaker is outlined in the legislation. It is required that water undertakers take the form of a limited company or a statutory water company, whereas a sewerage undertaker must be a limited company.⁶¹⁰ A company is appointed by the Secretary of State or by a general authorisation provided by the Secretary of State to OFWAT.⁶¹¹ An appointed company is subjected to duties imposed by enactments.⁶¹²

A new licence which is granted due to the cessation of an incumbent's licences would be a rare circumstance due to takeovers. New appointments or appointments followed by variations of an incumbent undertaker's licences are more common.⁶¹³ OFWAT may grant new appointments if one of the three conditions is fulfilled: (i) the site is unserved, or (ii) large user criterion (the site will or is serving over than 50 megalitres per year) and the customer would like to change its supplier, or, (iii) the incumbent company provides consent.⁶¹⁴

Applicants must serve notice to existing appointees, EA and local authorities.⁶¹⁵ OFWAT is also obligated to publish a notice stating its proposals to make appointments or variations, stating the purpose and reason in doing so and specify the period when representation and objection can be made.⁶¹⁶ Such notices

⁶¹⁰Water Industry Act 1991 (England) s 6 (5). These are privately financed water companies authorised to supply water under the Water Act, 1945. 8 & 9 GEO. 6. c. 42. Most of these companies have undergone consolidation with larger companies. See also Statutory Water Companies Act 1991 c.58

⁶¹¹Water Industry Act 1991 (England) s. 6 (1)

⁶¹²Ibid s 6 (2)

⁶¹³See ibid s.7 (4)

⁶¹⁴Ibid s.7 (4)

⁶¹⁵Ibid s.8 (2)

⁶¹⁶Ibid s.8 (3)

must be published in a manner appropriate to bringing attention to any affected persons.⁶¹⁷

WSL type licences

A WSL type licence provided the licensee the right to supply water (or to supply and introduce water) to consumers using an undertaker's network, thus providing the legal basis for common carriage. A retail licence will authorise a licensee only to supply water, whereas to supply and introduce water a combined licence would be required.⁶¹⁸

In order to apply for a WSL, an applicant must not be a relevant undertaker.⁶¹⁹ WSL licences⁶²⁰ can only occur under these three conditions, namely, if the customer's premises are not household premises, if the customer's aggregate demand on the premises is not less than 5 megalitres (50 megalitres in Wales)⁶²¹ annually and if the premises are not being supplied by another licensee pursuant to a water supply licence.⁶²² OFWAT established and publishes the criteria for approving licences, consisting of the applicant's financial, managerial and technical competencies⁶²³ and

⁶¹⁷ Ibid s.8 (4)

⁶¹⁸ Ibid s.17 A (5)

⁶¹⁹ Ibid s.17A (8) b

⁶²⁰ See , *New appointments and variations – a consultation on our process* p.1 The Competition Appeals Tribunal has been critical towards OFWAT licencing regime. See Hendry, 'An Analytical Framework for Reform of National Water Law' section 5.2.3

⁶²¹ The Water Supply (Amendment to the Threshold Requirement) Regulations 2011, SI 2011 No. 3014 The previous threshold was 50 megalitres but in December 2011 this was reduced to 5 megalitres in England through the amendment of s.17D Water Industry Act 1991 (England)

⁶²² Water Industry Act 1991 (England)s.17A(3)

⁶²³ 'Guidance on applying for a water supply licence Version 3' (*Ofwat*, 2011) <www.ofwat.gov.uk/competition/wsl/gud_pro_wslappguid.pdf> accessed March 17, 2012

specifies the exact particulars, documents and information that an applicant must submit for the purpose of assessment by OFWAT.⁶²⁴ There is no rigid rule for this assessment. The legal basis for this type of assessment appears to be rooted in the WIA s 2 (2A) (d) which obligates the Director “*in the manner he considers is best calculated... to secure that the activities authorised by the licence of a licensed water supplier and any statutory functions imposed on it in consequence of the licence are properly carried out*” .⁶²⁵ With this wide formulation on the WIA, OFWAT is free to employ its own method of assessing the applicants.

Companies applying for WSL licences are required under the WIA 1991 to publish a notice of application on their website or through any other means after OFWAT notifies the applicant that a valid application has been received.⁶²⁶ The notice must contain the timescale and address where representations and objections can be made.⁶²⁷ The requirement for transparency is further justified due to the fact that water services businesses will involve some sort of local monopoly situation where “exit” is impossible or very difficult for customers. Interested stakeholders must, therefore, be permitted to convey their views and present their objections. This will only be possible if there are adequate transparency mechanisms in place, such as the aforementioned legislative requirement to publish the notice of licence application.

⁶²⁴ Ibid

⁶²⁵ Water Industry Act 1991 (England) s. 2 (2A) (d)

⁶²⁶ Ibid s.17 F (2) See also The Water Supply Licence (Application) Regulations 2005, SI 2005 No. 1638 Regulation 5 (5)

⁶²⁷ Water Industry Act 1991 (England) s.17 F (3)

In addition, OFWAT is also required by the regulation to publish the application notice on its website.⁶²⁸

The timescale provided to present objections is 20 working days.⁶²⁹ OFWAT invokes a “customer no worse-off policy” as a part of its assessment criteria, which means that customers should not be put in a worse position after a new licence is granted.⁶³⁰ This includes the assessment of service level impacts and prices. OFWAT will accept higher service levels for a higher price if there is customer support.⁶³¹

5.3.1.2. Licence conditions

The WIA provides OFWAT (and statutorily, the Secretary of State), the power to impose conditions of appointment.⁶³²

Undertaker’s and NAV licences

The conditions for NAV licences are essentially the same as undertaker’s licences.⁶³³ The conditions of appointment normally comprise of 17 items. Those

⁶²⁸ SI 2005 No. 1638 Regulation 5 (6)

⁶²⁹ Ibid Regulation 6

⁶³⁰ *New appointments and variations – a statement of our policy* (Ofwat February, 2011) para 6.4

⁶³¹ Ibid para 6.4.4.

⁶³² Water Industry Act 1991 (England) s 11

⁶³³ ‘Appointment of SSE Water Limited as a Water and Sewerage Undertaker and Variation of the Appointment of Wessex Water Services Limited as a Water and Sewerage Undertaker’ (*Ofwat*, 2012) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_sse.pdf> accessed April 18th 2012
‘Appointment of Veolia Water Projects Limited as a Water and Sewerage Undertaker and Variation of the Appointments of Thames Water Utilities Limited as a Water and Sewerage Undertaker’ (*Ofwat*, 2012) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_vwp.pdf> accessed April 18th

with particular importance are condition B (charges) which embodies the price limit (RPI+K) and periodic reviews, condition F (accounts and accounting information) which includes accounting records, statements, financial ring-fencing, audit and publication of statements, condition G (code of practice for customers and relation with customer service committee), condition H (code of practice and disconnection procedure) and condition J (level of service and service target).⁶³⁴

With the breadth and detail of the items regulated in the licence conditions, the licence becomes the primary instrument for regulation, constituting the operational “rule of the game” in the water industry, governing the relation between the water companies, OFWAT and consumer. Yet, because they are licences, they are much more flexible than legislations and contracts, requiring only the exercise of discretionary power vested in OFWAT (and statutorily, the Secretary of State) for its modification or termination.⁶³⁵

WSL type licences

⁶³⁴ Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989 (2005) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_tms.pdf> accessed May 24, 2011
Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989 (1989) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_wsh.pdf> accessed May 24, 2011
Instrument of Appointment by the Secretary of State for the Environment of Severn Trent Water Limited as a water and sewerage undertaker under the Water Act 1989 (1989) <http://www.ofwat.gov.uk/industrystructure/licences/lic_lic_svt.pdf> accessed May 24, 2011

⁶³⁵ On the high transaction cost of contract renegotiation see in general Guasch, J.L. and Straub, S., ‘Corruption and concession renegotiations. ☆ Evidence from the water and transport sectors in Latin America’ 17 Utilities Policy 185 Guasch, J.L., Laffont, J.J. and Straub, S., ‘Renegotiation of concession contracts in Latin America: Evidence from the water and transport sectors’ 26 International Journal of Industrial Organization 421

For WSLs, the WIA outlines the principal framework of licence conditions⁶³⁶ and further authorises the Secretary of State to enact a standard licence condition.⁶³⁷ The standard licence condition is much simpler compared to undertakers' licences: it comprises of certain requirements during droughts, the requirement to provide information to relevant undertakers, protocols for transferring customers, definition of areas of operation, the obligation to transact at arm's length, provision of information to OFWAT and conditions which entail the revocation of such licences.⁶³⁸

5.3.1.3. Legal obligation to publish licences

Undertaker's and NAV licences

For NAV licences, OFWAT is required to “*serve notice of the making of the appointment or variation*” to local authorities and the NRA and “*serve the copies*” of the appointment and variation to existing appointees.⁶³⁹ Although the proposal for making appointments must be brought to the attention of any persons likely to be affected by it there are no statutory requirements to publish NAV licences once they are approved. Nevertheless, in practice, both licences of the original undertakers and NAVs are published by OFWAT.⁶⁴⁰ The power in publishing these licences comes

⁶³⁶Water Industry Act 1991 (England) s. 17 G

⁶³⁷Ibid s. 17 H

⁶³⁸ *Water Industry Act 1991 Section 17 H, Standard Conditions of Water Supply Licences* (Department for Environment, Food and Rural Affairs (DEFRA) 2005)

⁶³⁹ Water Industry Act 1991 (England) s. 8 (5) (a) and (b)

⁶⁴⁰Ibid s.8 (4) see section 5.3.1.1, see also ‘Water company licences’ (Ofwat, No Year) < <http://www.ofwat.gov.uk/industrystructure/licences/>> accessed January 13

not from a specific statutory obligation to publish licence instruments but from a general empowerment to publish regulatory information under WIA s.201.⁶⁴¹

WSL type licences

WSLs are different. OFWAT is required to “*serve a copy of the licence or licence as varied*” (instead of just a notice) to a number of regulators (EA, DWI, CC Water) including the undertakers, so there is a wider scope of information users targeted by the WIA than for a NAV licence, however, there are no requirements to serve such copies of licences to customers or to publicly disclose them.⁶⁴² OFWAT said in its guidance that it “*will retain a copy of the licence or variation of the licence*” in its library, in addition to issuing a press notice subsequent to licence approvals and maintain a Register of Licensees on their website.⁶⁴³ OFWAT’s Register of Licensees contains the list of WSL licencees and the copies of its licences and its contact details.⁶⁴⁴ To conclude, similar to the publication of undertakers’ licences on OFWAT’s website, the publication of WSL licences is OFWAT’s own initiative rather than a statutory obligation. Nevertheless, statutes do have the role of enabling publication by providing discretionary power to OFWAT to do so, through WIA s.201

5.3.2. Selection and removal of economic regulator

⁶⁴¹Water Industry Act 1991 (England) s.201, see section 5.3.5 below

⁶⁴²Ibid s. 17 (F) (7)

⁶⁴³ , ‘Guidance on applying for a water supply licence Version 3’ p.9 In its website, it says that “*The Water Supply Licences held on the WSRA’s Register may be inspected during normal office hours at OFWAT, 7 Hill Street, Birmingham, B5 4UA (telephone number 0121 644 7500)*” ‘Water Supply Licences’ (Ofwat, No Year) <http://www.ofwat.gov.uk/competition/wsl/prs_web_wsllicences> accessed January 16, 2012 ibid

⁶⁴⁴ ‘Water Supply Licensees’ Contact Details’ (Ofwat, No Year) <http://www.ofwat.gov.uk/competition/wsl/prs_web_wslcontacts> accessed January 16, 2012

The regulation of OFWAT's internal governance in the WIA is very minimal, presumably in order to allow the regulatory body to be independent, with the focus on the Secretary of State's powers to appoint and remove OFWAT's members and Chairman. The WIA prescribes that OFWAT shall consist of at least a chairman and two other members⁶⁴⁵, appointed by the Secretary of State for a five year term.⁶⁴⁶ The Secretary of State also holds the power to remove the chairman or OFWAT members from their offices on the grounds of 'incapacity' or 'misbehaviour'.⁶⁴⁷ In practice, OFWAT's structure consists of a Chairman, a chief executive and a number of executive and non-executive directors.⁶⁴⁸

In the wake of the Nolan Report⁶⁴⁹, all public appointments in the UK are subject to standards⁶⁵⁰ imposed by The Commissioner for Public Appointments⁶⁵¹ requiring transparency in appointments, including the setting up of a recruitment

⁶⁴⁵Water Industry Act 1991 (England) Schedule 1A para. 1(1)

⁶⁴⁶Ibid Schedule 1A para. 3(1)

⁶⁴⁷Ibid Schedule 1A para. 3(2) (a)

⁶⁴⁸ *Rules of procedure for the Water Services Regulation Authority (Ofwat)* (Ofwat) <http://ofwat.gov.uk/aboutofwat/structure/gud_pro_100616rulesofprocedure.pdf> accessed May 5th, 2011

⁶⁴⁹ Great Britain Committee on Standards in Public Life, *Standards in public life, First Report of the Committee of Standards in Public Life (Nolan Report)* (1995)

⁶⁵⁰ The Commissioner for Public Appointment, *Code of Practice for Ministerial Appointments to Public Bodies* (2009)

⁶⁵¹ Public Appointments Order in Council 2002, Notice: 1006 (Issue: 56648), 30 July 2002 (as amended).

website.⁶⁵² OFWAT and DEFRA also set up a recruitment website and indicate that candidates may be required to appear before a Parliamentary Select Committee.⁶⁵³

Other than the question of appointment and removal of OFWAT members or chairman, the OFWAT is free to arrange its own household.⁶⁵⁴ The WIA enables OFWAT to appoint staff, subject to the approval of the Minister of Civil Service and applicable rules on civil servants.⁶⁵⁵ One of the most significant discretions to OFWAT granted by the WIA in managing its household is its power to regulate its own procedure and to enact a code of practice.⁶⁵⁶ These two instruments contain lengthy and detailed regulations with significant implications for OFWAT's internal governance.

OFWAT is accountable to the parliament and is statutorily required to present two kinds of reports annually: the first is the "forward work program" containing its expenditure plans as well as non routine projects and the second is the annual report.⁶⁵⁷ The WIA also prescribes the minimum content of the annual report.⁶⁵⁸ In addition, OFWAT is required by other legislation to create and report its resource

⁶⁵² The Commissioner for Public Appointment, *Code of Practice for Ministerial Appointments to Public Bodies* para 5.33-5.36 "Publishing Vacancies"

⁶⁵³ ofwatrecruitmentboard.com, 'Background to the appointments' <http://www.ofwatboardrecruitment.com/sections/about_the_org/background_to_the_appointments> accessed November 12, 2011

⁶⁵⁴ Consider also, OFWAT's supplementary power to "...do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions", including forming advisory bodies. See Water Industry Act 1991 (England) Schedule 1A para 12

⁶⁵⁵ Ibid Schedule 1A para. 5

⁶⁵⁶ Ibid Schedule 1A para 8 and 9. This should be done by consultation with the Secretary of State, the Welsh Assembly, The Environment Agency, the Consumer Council, undertakers, licensed water suppliers and any other parties which OFWAT 'considers appropriate'. See para 9 (3)

⁶⁵⁷ These are obligatory under s.192A and 192B. See *ibid*

⁶⁵⁸ Ibid s.192B (2)

account to the Comptroller/Auditor General to the House of Commons.⁶⁵⁹ The Secretary of State is required by law to arrange the publication of such reports and in practice such reports including the Comptroller's certificate are published by OFWAT on its website.⁶⁶⁰

5.3.3. Conflict of Interest

Rules on Conflict of Interest (CoI) are embodied in OFWAT's procedure⁶⁶¹ which, as discussed in the previous section, was enabled through the WIA.⁶⁶² This is quite different from Victoria, where the regulator's CoI rules are prescribed in detail, through legislation.⁶⁶³

OFWAT's rules of Procedure require the disclosure of any conflict of interest.⁶⁶⁴ No clear distinction is made between "existing" or "foreseeable" CoI.⁶⁶⁵ When in doubt if a matter amounts to a conflict of interest, an OFWAT member has the obligation to disclose,⁶⁶⁶ in which event the person may either choose to absent himself from any discussion and decision or ask the Chairman how to proceed.⁶⁶⁷ The Procedure provides OFWAT's Chairman with the discretion of how to proceed in

⁶⁵⁹ Government Resources and Accounts Act 2000, 2000 c. 20

⁶⁶⁰ Water Industry Act 1991 (England) s.192B (5) See OFWAT publication of its annual report and resource account *Annual report and accounts 2010-11 For the period 1 April 2010 to 31 March 2011* (Water Services Regulation Authority (Ofwat), 2011) <http://www.ofwat.gov.uk/aboutofwat/reports/annualreports/rpt_ar2010-11print.pdf> May 21st 2012

⁶⁶¹ , *Rules of procedure for the Water Services Regulation Authority (Ofwat)*

⁶⁶² Water Industry Act 1991 (England) Schedule 1A para 7

⁶⁶³ See also section 3.3.1 on Victoria above

⁶⁶⁴ , *Rules of procedure for the Water Services Regulation Authority (Ofwat)* para. 19.

⁶⁶⁵ Compare this with the obligation to disclose "...existing or foreseeable pecuniary interest" in Victoria. See section 4.3.3 on Victoria

⁶⁶⁶ , *Rules of procedure for the Water Services Regulation Authority (Ofwat)* para.20

⁶⁶⁷ Ibid para.22

such circumstances, by deciding that the member should absent himself from any discussion or decision related to his interest, or to allow him to be present but without the right to participate or to allow him to be present and participate in discussions and decisions but only with respect to statements of facts.⁶⁶⁸ If parties affected by a CoI have been consulted and do not raise any objection, the matter may cease to be treated as a CoI.⁶⁶⁹

Definition of a CoI in OFWAT's Procedure encompasses both pecuniary and non-pecuniary interest⁶⁷⁰ similar to Victoria's ESC CoI rule.⁶⁷¹ 'Interest' may consist of equity or any other financial interest and any employment, consultancy, directorship or other remunerative agreement with companies and its affiliates which are currently regulated (or may in the future be regulated) by OFWAT.⁶⁷² When spouses, partners or children of an OFWAT member possess such 'Interest',⁶⁷³ as defined above, there is an obligation to notify the Chairman⁶⁷⁴ who will then prescribe a course of action.

⁶⁶⁸ Ibid para.24

⁶⁶⁹ Ibid Annex A para 1.5

⁶⁷⁰ Ibid Annex A para 1.4: "...any interest or duty that is held by a Board Member – whether or not financial in nature – that a fair-minded and informed observer, having considered all of the relevant facts, would conclude gave rise to a real possibility of bias in relation to a matter which that Board Member is required to consider or decide" .

⁶⁷¹ Essential Services Commission Act 2001 (Vic), s.27

⁶⁷² , *Rules of procedure for the Water Services Regulation Authority (Ofwat)*

⁶⁷³ Ibid para 4.3

⁶⁷⁴ Ibid para 4.6

One of OFWAT's good practices on CoI is the maintenance of a Register of Board Members' Disclosable Interests⁶⁷⁵ (Register), which is a public document and must be amended from time to time to ensure its accuracy.⁶⁷⁶ As the Procedure outlines, the purpose of such Register is to "*ensure transparency in relation to any interests of Board Members – or of their spouses, partners and dependant children – that have or might be perceived as having the potential, to give rise to a conflict of interest*".⁶⁷⁷ As such, the information contained in the Register also encompasses existing or past relationships between dependants of OFWAT Members with OFWAT regulated companies.⁶⁷⁸

In regulating a possible 'revolving door', the Procedure requires Board Members to obtain approval from OFWAT's Chairman and DEFRA if – within the period of two years subsequent to their retirement from OFWAT – they wish to accept an appointment from (or those which in the future may be) an OFWAT regulated company, its affiliates or major supplier or contractors.⁶⁷⁹

One of the incentives for the Board Members to comply with the Procedure is the possibility of litigation directed against them personally (and not to OFWAT as an

⁶⁷⁵ This is also practiced by other regulatory boards in the UK, see Ofcom's 'Register of disclosable interests – Ofcom Board' (*Ofcom*, 2011) <<http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board-2/members/register-of-disclosable-interests/>> accessed May 11, 2011

⁶⁷⁶ , *Rules of procedure for the Water Services Regulation Authority (Ofwat)* paras 4.7 and 4.8

⁶⁷⁷ Ibid para 4.9

⁶⁷⁸ This could be in the form of company directorship to employment, consultancy activities, equities or financial interest, as well as other remunerative agreements. Ibid Para 4.12

⁶⁷⁹ Ibid Annex A, para . 6. The purpose of this, other than to avoid the suspicion of a revolving door (see para 6.2.a) is also to protect competitors from unjustified exploitation of trade secret or confidential information to which the said OFWAT Members have had access during the course of their work (see para 6.2.b)

institution) from parties aggrieved by their misconduct. The Procedure hinted that personal criminal and civil liability may be incurred by OFWAT's Chairman or other members, in cases involving fraudulent or negligent statement, breach of confidence or insider trading.⁶⁸⁰

In order to function, such a mechanism above may require water companies to be listed in the capital market and for sufficient competition ('for' or 'in' the market or through 'yardstick') to exist. When some degree of competition exists, regulated companies will have adequate interest to pursue litigation against members of the regulatory body for their impartiality. If the companies are not listed in the capital market (such as the case in Victoria) or if competition is limited or absent (such as the case in Jakarta, where only two companies are regulated), there may not be adequate economic interest for the regulated companies to commence civil or criminal litigation against the members of the regulatory body for their impartiality or negligence.

5.3.4. Means of acquiring information

In England, legislation requires companies to submit information to the regulator and provides discretion for the regulator to disclose any information in its hands, including information provided by the regulated companies, to the public.

English DWI has the power to enter any of the water companies' premises for the purposes of its investigation and carry out inspections, measurements and tests, take away samples or articles⁶⁸¹ and it may alternatively, at any reasonable time,

⁶⁸⁰Ibid Annex G (Code of Conduct) para 13

⁶⁸¹Water Industry Act 1991 (England) s.86 (4)(a),(b)

require water companies to supply it with copies, extracts and records indicating the company's effort to comply with drinking water quality regulations or require "relevant persons" from the companies to supply them with relevant information.⁶⁸²

WIA requires companies to "*furnish the Secretary of State with all such information relating to any matter*"⁶⁸³ related to the company's functions as a water undertaker or any other information considered material by the Secretary of State. The WIA also empowers the director to collect information on utilities' performance.⁶⁸⁴ Condition M of the Licence Condition of an undertaker typically contains clauses for the company to furnish an OFWAT director with information he requires for regulatory purposes subject to some exception.⁶⁸⁵ Condition M further provides discretion to OFWAT to regulate the details of such submission and to require companies to provide reasonable explanation.⁶⁸⁶ Furthermore, Condition J of the company's licence requires the submission of "Levels of Service Information and Service Targets".⁶⁸⁷ The regulator has the power to conduct investigations in order to verify that the reports on service levels are correct. The power allows the regulator to

⁶⁸² Ibid s.86 (4) c

⁶⁸³ Ibid s.202. Companies are also required to "...*comply with any direction given by the Director*" in accordance with its licence condition or any other arrangements under s 12 (1). See also the duty to report compensation and performance under s. 38A. Ibid

⁶⁸⁴ Ibid s. 38A (2)

⁶⁸⁵ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition M

⁶⁸⁶ ibid Condition M. 2: "*Information required to be furnished under this Condition shall be furnished in such form and manner and at such times and be accompanied or supplemented by such explanations as the Director may reasonably require*".

⁶⁸⁷ Ibid Condition J

inspect utilities' premises, copy, take extracts and conduct tests and measurements, subject to reasonable prior notice.⁶⁸⁸

OFWAT also issue guidelines to water companies detailing data and information it should submit annually.⁶⁸⁹ This is known as the "June Return". If a company misreports its June Return data, it may be held to be in breach of Licence Conditions M and/or J and could therefore be liable for a penalty.⁶⁹⁰

However, OFWAT is considering moving towards a "risk based approach" of regulation, which according to OFWAT will significantly decrease the regulatory burden.⁶⁹¹ This would have a significant impact on OFWAT's information gathering processes, especially the June Return. Under the new approach, utilities will no longer be required to submit the annual June Return, but provide certificates of risk and compliance statements containing their board's signatures, publish several key

⁶⁸⁸ Ibid Condition J para 9

⁶⁸⁹ 'Reporting requirements' (Ofwat, 2011) <<http://www.ofwat.gov.uk/regulating/junereturn/reportingreq/>> accessed June 9, 2011. Other than June Return, OFWAT acquire information from other reporting duties such as principal statements; charges schemes; regulatory accounts; business plans; customer literature; codes of practice; and cost base information. See Ofwat, *Getting it right for customers, How can we make monopoly water and sewerage companies more accountable?* (2010) <http://www.ofwat.gov.uk/publications/focusreports/prs_web_1011regcompliance.pdf> accessed December 01, 2011 p.38

⁶⁹⁰ See for example *Notice of Ofwat's proposal to impose a penalty on United Utilities Water Plc* (Ofwat 2007)

<http://www.ofwat.gov.uk/regulating/enforcement/enforcenotices/not_fne_nwt_notpen180407.pdf?download=Download#> accessed July 1, 2011 p. 1

⁶⁹¹ Ofwat, *Getting it right for customers, How can we make monopoly water and sewerage companies more accountable?* The incremental cash cost for the June Return for the whole industry is approximately 6.5 million GBP. See Gray, *Review of Ofwat and consumer representation in the water sector* p.35

performance indicators⁶⁹² and also directly publish their regulatory accounts and accounting separation information.⁶⁹³ With less reliance on utilities’ “reporting duties”, it is likely that OFWAT will rely on their investigative power and incidental information requests to companies for either clarification or investigation purpose should they suspect the utilities to be in breach of its licences.

5.3.5. OFWAT’s general policy on disclosure

OFWAT believes that transparency encompasses three elements: (i) consultation, (ii) information, and (iii) reasoned decision. Consultation is achieved through workshops, seminars, media and seeking written responses to published consultations. Information is achieved by publication of regulatory materials and reasoned decision is employed at every level, from dispute determination to price limits.⁶⁹⁴

Legislation is generally silent with respect to the details of the publication of information by OFWAT or the Secretary of State, but acts as an “enabler” of transparency instead, by providing them with wide discretion to publish.⁶⁹⁵ This is

⁶⁹² The indicators are currently under consultation process. However, OFWAT’s proposal is to include these four items: Customer experience, Reliability and availability, Environmental impact and Finance. See Ofwat, *Regulatory compliance – a proportionate and targeted approach, A consultation*

⁶⁹³ Ibid

⁶⁹⁴ *How we do our job: A code of practice governing the discharge of Ofwat’s functions* (Ofwat 2003) <[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/cop_110903.pdf/\\$FILE/cop_110903.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/cop_110903.pdf/$FILE/cop_110903.pdf)> accessed May 5th, 2011

⁶⁹⁵ There are some transparency requirements, such as the requirement to publish performance information to customers under s.93D and 27 F, and in publishing water (s.198) and sewer network (s.199) in the form of a map but these applies to utilities, not OFWAT. There is an obligation for an OFWAT Director to publish utilities’ performance information “*in such form and in such manner as he considers appropriate*” at least once a year. (s. 38A (4)). This clause corresponds to directors’ powers in

reflected, for example, by WIA s.201 which stipulates that the Secretary of State and the Director (of OFWAT) may arrange for the publication “*in such form and in such manner as he considers appropriate*”⁶⁹⁶ of information related to the companies which would be in the *public interest*⁶⁹⁷ to be published.⁶⁹⁸ When disclosing the information, there is a duty for the Secretary of State and OFWAT to ‘have regard’ to the need for excluding information related to individual affairs or the affairs of a body of persons (corporate or incorporate) if the publication may “seriously and prejudicially affect” their interests.⁶⁹⁹

The above discretion to publish comes with a caveat. Section 206 of the WIA restricts the disclosure of any information acquired by virtue of the WIA or any information relating to the affairs of individuals or business.⁷⁰⁰ Violation of this

collecting information under s.38A(2) discussed on the previous section. Water Industry Act 1991 (England)

⁶⁹⁶Ibid s 201 (1)

⁶⁹⁷ The exact term of s201 (1) is: “*as it may appear to him to be in the public interest to publish*”. Hence, the legislation provides discretion to the regulator to judge which matters are considered to be in the public interest. Ibid s 201 (1)

⁶⁹⁸ This is further reinforced in the company’s licence condition. See Condition M.3. , *Instrument of Appointment by the Secretary of State for the Environment of Severn Trent Water Limited as a water and sewerage undertaker under the Water Act 1989* “...nothing in this paragraph shall prevent the Director from using or disclosing any Information with which he has been furnished under this Condition or any other Condition of this Appointment for the purpose of carrying out his functions under the Act”.

⁶⁹⁹Water Industry Act 1991 (England) s201 (3) The duty of the regulator is only to “have regard”, and so long as it is exercised, the regulator has carried out its statutory obligation. Moreover, in order for disclosure to be considered for exemption, the matter must “seriously” and “prejudicially” “affect” their interest. This empowers the regulator with wide power to disclose regulatory information. As we shall see later on in the chapter discussing the passive disclosure rule, the causality between disclosure and harm and the severity of harm may be difficult to assess.

⁷⁰⁰Ibid s.206 (1) For similar provision, see Utilities Act 2000, 2000 c. 27 s.105 and Railways Act 1993, 1993 c. 43 s.145 also Enterprise Act 2002, 2002 c.40 s.237

provision is considered an offence and may be liable for imprisonment.⁷⁰¹ It was thought that s.206 would be repealed after the FoI Act 2000 came into force⁷⁰², but it turned out that it was preserved.⁷⁰³ Therefore, information exempt under s.206 can still be exempted even when it is requested to be disclosed under the FoI regime, as the FoI regime contains exceptions preserving information made confidential by other statutes.⁷⁰⁴

Such a restriction under s.206, however, contains many qualifiers; for example, that it does not apply if the disclosure is necessary to facilitate the carrying out of the functions of the regulators (this includes OFWAT, the Secretary of State, CC Water and the Competition Commission, among others)⁷⁰⁵ as well as for health, safety, environmental or other regulatory reasons.⁷⁰⁶

OFWAT has been publishing the June Return information to the public domain although some commercial, in confidence information is being excised.⁷⁰⁷ There are several categories in applying the excision: category 1 is price sensitive information whose publication or publication by reference to other information may

⁷⁰¹Water Industry Act 1991 (England) s.206 (7) and (8)

⁷⁰² “DEFRA have told us that the statutory bar on the provision of information to third parties in s206 of the Water Industry Act 1991 will be amended or repealed to coincide with the full implementation of the FOIA on 1 January 2005.” Dunshea, R.D., RD 22/04, Freedom of Information Act 2000 (Ofwat 2004) <http://www.ofwat.gov.uk/aboutofwat/foi/ltr_rd2204_foi2000> accessed August 4, 2010

⁷⁰³ Dunshea, R.D., RD 10/05: *Freedom of Information Act 2000 – s206 of the Water Industry Act* (Ofwat 2005) <http://www.ofwat.gov.uk/aboutofwat/foi/ltr_rd1005_fois206wia1991> accessed August 9, 2010 “The Department of Constitutional Affairs announced on 16 June that s 206 of the WIA 1991 will be retained”

⁷⁰⁴ FoI Act 2000 (England) s. 44 (1) (a)

⁷⁰⁵Water Industry Act 1991 (England) s.206 (3) (a)

⁷⁰⁶ See the long list of qualifiers in s.206 (b)-(k). Ibid

⁷⁰⁷ Ofwat, ‘Publication of the June return 2009’ (Ofwat 2009) <http://www.ofwat.gov.uk/regulating/junereturn/ltr_rd0809_jr09> accessed May 24, 2011

affect share prices, category 2 is information which could assist contractors or potential contractors in tenders, category 3 is information which has not been approved by affected organisations or individuals for disclosure, category 4 is information which could give third parties a commercial advantage and category 5 is information with a security risk to the nation or an individual.⁷⁰⁸

Upon making an FoI request to OFWAT,⁷⁰⁹ the author discovered that such categorisation above is not based on any policy⁷¹⁰, but probably developed out of practice instead. In MD 135, Ian Byatt (OFWAT's Director at that time) decided that he would not pre-determine what information is confidential.⁷¹¹ The companies'

⁷⁰⁸ See Thames Water Utilities LTD, *June Return 2006: Statement to Accompany the Public Domain Version* (2006)

<[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR06_TMS_ExcisionsStatement.pdf/\\$FILE/JR06_TMS_ExcisionsStatement.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR06_TMS_ExcisionsStatement.pdf/$FILE/JR06_TMS_ExcisionsStatement.pdf)> accessed June 9, 2011 Northumbrian Water Limited, 'June Return 2007: Statement to Accompany the Public Domain Version' (*Northumbrian Water*, 2006)

<[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR07_YKY_ExcisionsStatement.pdf/\\$FILE/JR07_YKY_ExcisionsStatement.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR07_YKY_ExcisionsStatement.pdf/$FILE/JR07_YKY_ExcisionsStatement.pdf)> Yorkshire Water, *June Return 2007: Statement to Accompany the Public Domain Version* (Northumbrian Water 2006)

<[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR07_YKY_ExcisionsStatement.pdf/\\$FILE/JR07_YKY_ExcisionsStatement.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR07_YKY_ExcisionsStatement.pdf/$FILE/JR07_YKY_ExcisionsStatement.pdf)> accessed June 9, 2011 United Utilities, *June Return 2006: Statement to Accompany the Public Domain Version* (Northumbrian Water 2006)

<[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR06_NWT_ExcisionsStatement.pdf/\\$FILE/JR06_NWT_ExcisionsStatement.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR06_NWT_ExcisionsStatement.pdf/$FILE/JR06_NWT_ExcisionsStatement.pdf)> June 9, 2011 Northumbrian Water Limited, *June Return 2007: Statement to Accompany the Public Domain Version* <[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR07_NES_ExcisionsStatement.pdf/\\$FILE/JR07_NES_ExcisionsStatement.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/JR07_NES_ExcisionsStatement.pdf/$FILE/JR07_NES_ExcisionsStatement.pdf)> accessed June 9, 2011

⁷⁰⁹ Paula Bennett, *Re: Ofwat's excision policy for the June Return data (Email Correspondence, June 21) (2011)*

⁷¹⁰ "I am afraid that there is no source document as such for the categorisation policy" See *ibid*

⁷¹¹ Byatt, I.C.R., *MD135, Confidentiality for July Returns and PR99 Information Submission* (Ofwat 1998)

responses as to which information should be declared confidential varies.⁷¹² Byatt gave some indication of which tables (of the June Return) are likely to be prejudicial if disclosed, but it is up to the companies to decide which information is confidential by marking it in both electronic and hard copy submission made to OFWAT.⁷¹³ In doing so, the companies must set out the justifications for its restriction and this explanation will be published along with other information which is not excised.⁷¹⁴ RD 29/98 makes clear that OFWAT may still need to consider the justification used in excisions, and if it declines the companies' justification, it will provide time for companies to make representations and prepare for publication.⁷¹⁵

The move towards a risk based approach to regulation as discussed in the previous section would mean that the above June Return excision 'policy' will no longer be relevant. If OFWAT no longer collects the June Return data, it will have no similar information to be disclosed to the public. It will be the companies themselves who will be responsible for the publication.

5.3.6. Service Level and Customer Service

⁷¹² RD 29/98 sum up the companies' responses on what information should be made confidential (and not) based on MD 135 Dunshea, R.D., *RD 29/98, Confidentiality for July Returns and PR99 Information Submission* (Ofwat 1998)

⁷¹³ Byatt, MD135, *Confidentiality for July Returns and PR99 Information Submission* "The only areas that I believe could be considered to have a serious and prejudicial effect are Tables 30, 31, 35a, 35b, 36a, 36b and 39 plus the associated commentaries of the standard July Return and table 40 in the enhanced July Return for 1998."

⁷¹⁴ Ibid

⁷¹⁵ Dunshea, *RD 29/98, Confidentiality for July Returns and PR99 Information Submission*

Disconnection for non payment and the use of limiting devices for household customers is prohibited by the WIA.⁷¹⁶ Vulnerable groups are facilitated with lower tariffs and flexibility of payment.⁷¹⁷ This policy is not applicable to non household customers.⁷¹⁸ However, when a premise serves both non household customers and household customers, OFWAT categorise this as a “mix-use premise” where disconnection is disallowed.⁷¹⁹

WIA requires that water supplied by the utilities is “wholesome”.⁷²⁰ Wholesomeness is accomplished when the water supplied complies with the list of maximum or minimum concentrations or values prescribed by the water quality regulations or, when a prescription is absent, does not contain microorganisms, parasites or substances at concentrations or values which could be potentially dangerous to human health.⁷²¹ The supply of water unfit for human consumption is an offence.⁷²²

When contamination occurs, water undertakers have the power to disconnect and the obligation to serve notices to customers, specifying the steps that need to be

⁷¹⁶ Water Industry Act 1991 (England) s.61(1A)

⁷¹⁷ Water Industry (Charges) (Vulnerable Groups) Regulations 1999 SI 1999/3441 (as amended) See Regulation 2

⁷¹⁸ Water Industry Act 1991 (England) s.61

⁷¹⁹ ‘Disconnection of Mixed-Used Premises For Non Payment of Water Charges, RD 14/04’ (2004) <http://www.ofwat.gov.uk/regulating/charges/ltr_rd1404_disconmixeduse> accessed April 28, 2012

⁷²⁰ Water Industry Act 1991 (England) s 68 (1) (a)

⁷²¹ In most situations, the regulation prescribes a maximum value, acidity (pH) level is the exception, with a minimum value of 6.5 and a maximum of 9.5. See The Water Supply Regulations 2010, SI 2010 No. 1991 This SI is regularly amended. Particularly see Regulation 4 (2) (a).

⁷²² Water Industry Act 1991 (England) s. 70

undertaken before supply is restored.⁷²³ Legislation does not detail any further how contamination has to be communicated. There is no uniform standard on how companies should deal with contamination, so the mechanism has been developing out of practice. Some companies place alerts on websites, deliver notices by hand door-to-door, ring the customers and contact local doctors to obtain information on sensitive customers, and normally have pre-arranged agreements with local media in the event of emergencies.⁷²⁴ From the materials collected in one research project, it was revealed that 90% of the notices are ‘readable’.⁷²⁵

Service and customer service levels in England are contained in a Statutory Instrument⁷²⁶ separated from that regulating drinking water quality, and is called the Guaranteed Standard Scheme (GSS) which regulates six categories of customers’ rights⁷²⁷. These minimum standards are subject to some qualifications such as natural

⁷²³ Incidents must be immediately notified to the DWI as soon as they come to the attention of the company. The Water Industry (Suppliers’ Information) Direction 2009. See Water Industry Act 1991 (England) s. 75 (1) and (1A) and s.75 (3). Failure to serve notice is considered an offence see s.75 (5)

⁷²⁴ Risk Solutions, *Good Practice for Communicating about Drinking Water Quality; A report for The Drinking Water Inspectorate* (D5173/R1, 2009)

⁷²⁵ Ibid There are several methods by which to assess the readability of material, namely, through the Flesch-Kincaid grade level, Gunning fog index and Lexical Density Function See. Si, L. and Callan, J., ‘A statistical model for scientific readability’ (Proceedings of the tenth international conference on Information and knowledge management)

⁷²⁶ The power to make regulation is conferred on the Secretary of State, see Water Industry Act 1991 (England) ss. 38(2)-(4), 95(2)-(4), 213 (2)(d) (e), (2A)(a)-(c), and (2B)

⁷²⁷ The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008 No. 594 The six categories of customer’s rights are: (1) The making and keeping of appointments ; the GSS rule sets the obligation to provide notice specifying the exact time of the appointment with customers and the utilities’ obligation to keep such appointment. (2) Lack of pressure; the minimum pressure is set at 0.7 bar, violation occurs when a company fails to comply with such requirement more than twice, each more than one hour, within a 28 day period. (3) Supply interruptions; utilities are obliged to provide notice of planned interruptions of supply at least 48 hours before it occurs, specifying the time when supply will be restored, any alternatives of supplies that can be obtained and the

disaster or labour strikes. Violations occur when none of the qualifications apply. This entails financial penalties to be paid directly by the utilities to customers.

Another relevant instrument embodying “service levels and customers service” is Condition G of the company’s licence, which applies the “*Code of Practice for Customers and relations with the Customer Service Committee*” (currently CC Water).⁷²⁸ The Code of Practice must be approved by OFWAT and typically would contain: a description of tariff charges, arrangements for the payment of bills and payment by installments including budget plans, the procedures for making complaints, testing of meters, methods for meter reading, offences for tampering with meters, emergency conditions and making enquiries with the company, a description of CC Water and its contact information.⁷²⁹ The existence of the code and any substantive revision thereof must be put to customers’ attention.⁷³⁰ Utilities must also explain how the code can be inspected and copied by the customers.⁷³¹ OFWAT

telephone number of the utilities where queries can be made. If a utility fails to restore supplies by the time stated on the notice provided to customers it may be subjected to fines. (4) Queries on charges; when customers make queries (in writing) about the accuracy of their bill, utilities have the obligation to provide a substantive response. (5) Complaints in general; any written complaints must be responded to within 10 working days. (6) Sewer flooding; effluent from utilities’ sewers must not enter customers’ buildings and land properties. See *ibid* , Regulation 6, 10, 8, 9, 7, 11 and 12

⁷²⁸ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition G

⁷²⁹ Thames Water, ‘Code of Practice: important helpful information and advice for household customers’ (*Thames Water*,) <<http://www.thameswater.co.uk/cps/rde/xbcr/corp/codes-of-practice-and-customer-guarantee-scheme.pdf>> accessed May 31, 2011

⁷³⁰ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition G.6 (2)

⁷³¹ *Ibid*

require utilities to send, free of charge, the code in its latest form to anyone requesting it.⁷³²

While the GSS Rule prescribes the minimum amount of payment against violation of service standard, some companies use the Code of Practice to enhance the amount of the compensation.⁷³³

5.3.7. Non-compliance

As the analytical framework (Chapter 2) has elaborated, transparency is required, not only with respect to the content of the service levels and customer service, but also with respect to violation of such standards by the utilities and any enforcement measures by the regulator in response to such violations. The reason is because information on non compliance is vital for investors and creditors as it may influence their investment decisions, as well as for the public to create pressure to hold the regulator accountable and for the utilities to take action. It is also used to compel other companies to change behaviour in addition to maintaining a sense of fairness.⁷³⁴

⁷³² Ibid Condition G.6 (4)

⁷³³ Thames Water, 'Code of Practice: important helpful information and advice for household customers' p.7 See also Thames Water, 'Our guarantees to you: Customer Guarantee Scheme' (*Thames Water*,) <<http://www.thameswater.co.uk/cps/rde/xbcr/corp/customer-guarantee-scheme-detailed-version.pdf>> accessed May 31, 2011

⁷³⁴ According to OFWAT: "*Use of these enforcement tools and transparency about their use may also incentivise other companies to change their behaviour*".United Kingdom, *Ofwat's Approach to Enforcement* () <http://www.ofwat.gov.uk/regulating/enforcement/pap_pos_090731enforcementapproach.pdf> accessed July 1, 2011 para.19

Macrory recommended a framework for applying penalties, and that includes some transparency principles⁷³⁵, namely: (i) the publication of enforcement policy⁷³⁶, (ii) the justification on the choice of enforcement action⁷³⁷, (iii) transparency on which formal enforcement activities have been undertaken⁷³⁸ and (iv) transparency in the methodology for calculating penalties.⁷³⁹

OFWAT categorises⁷⁴⁰ formal enforcement action into several layers: the securing of formal undertakings from the companies (s.19)⁷⁴¹, the ‘enforcement order’ (s.18)⁷⁴² and finally, the imposition of financial penalties (s 22 A).⁷⁴³ ‘Enforcement Orders’ (s.18) can be imposed on utilities that contravene their licence conditions⁷⁴⁴ or

⁷³⁵ The other framework is in measuring the outcome of enforcement actions and to follow-up enforcement actions. United Kingdom, *Regulatory justice sanctioning in a post-Hampton world : consultation document* (2006) <<http://www.berr.gov.uk/files/file44582.pdf>> July 1, 2011 p.8

⁷³⁶ This is to signal to all stakeholders what the expected behaviours are, and what the consequences would be if they breach such expectation. See *ibid* p.21

⁷³⁷ This is to increase confidence in how regulatory non compliance is being dealt with. See *ibid* p.21

⁷³⁸ This is in order to keep stakeholders and the public up to date with regulatory action. Macrory considers that when and against whom the enforcement action is taken should be disclosed. This should be done for all types of enforcement: criminal, administrative, financial or improvement notices and such information must be easily accessible and take into account the firm’s and public’s interest. See *ibid* p.22

⁷³⁹ If the methodology for imposing fines is published, firms will have awareness of each mitigating or aggravating factor considered by the regulator, leading to the overall amount of the penalty. See *ibid* p.22 Aggravating factors may include the economic gains of non compliance. Mitigating factors may include actions to eliminate or reduce risk of damages. This will increase legitimacy of the financial penalty imposed and forces firms to learn that there are trade-offs between the amount of their illegal financial gain and penalty imposed.

⁷⁴⁰ See United Kingdom, *Ofwat's Approach to Enforcement* There are also ‘special administration orders’ for violation of ‘principal duties’ or where the utility is unable to pay its debts. Water Industry Act 1991 (England) ss. 23-25), but this occurs only in extraordinary circumstances and is not a part of day to day regulation

⁷⁴¹ Water Industry Act 1991 (England) s 19

⁷⁴² *Ibid* s 18

⁷⁴³ *Ibid* s22A

⁷⁴⁴ *Ibid* s 18 (1) (a) (i)

any other statutory requirement.⁷⁴⁵ The s.18 order requires them to do or not to do things which the order specified.⁷⁴⁶ An enforcement order must be preceded by a notice, specifying the purpose of the order, its effect, the requirement to secure compliance, the acts or omission which constitutes contravention and other supporting facts justifying the order.⁷⁴⁷ Such notices must be published⁷⁴⁸ and its copies served on the utilities.⁷⁴⁹

The alternative to s.18 enforcement orders is applicable in circumstances where OFWAT perceives the contravention to be of a trivial nature⁷⁵⁰ or where a company has agreed to provide an undertaking to OFWAT to secure compliance.⁷⁵¹ If the utility provides an undertaking, such undertaking will be perceived as a statutory requirement enforceable under s 18.⁷⁵² This, too, requires OFWAT to serve notice to companies and to publish a copy of such notice.⁷⁵³

Finally, OFWAT has the authority to impose financial penalties on the utilities for contravention of their licence conditions or for failing to achieve performance standards.⁷⁵⁴ There is an obligation to serve notice on three occasions: before the

⁷⁴⁵Ibid s 18 (1) (a) (ii)

⁷⁴⁶Ibid s 18 (5) (a)

⁷⁴⁷Ibid s 20 (1)

⁷⁴⁸ Ibid s 20 (2) (a) The provision continues by explaining that the purpose of such publication is to bring the matters to the attention of persons who may be affected

⁷⁴⁹ Ibid s 20 (2) (b)

⁷⁵⁰Ibid s 19 (1) (a)

⁷⁵¹Ibid s 19 (1) (b)

⁷⁵²Ibid s 19 (2)

⁷⁵³ Ibid s 19 (3)

⁷⁵⁴Ibid s 22A (1) (a)

penalty is made⁷⁵⁵ (as a Proposal to Impose Penalty), when it is decided that such proposal is to be varied⁷⁵⁶ and, after imposing the penalty.⁷⁵⁷ These notices should contain information, inter alia, on the amount of penalty (this should not be more than 10% of the utilities' annual turnover), the acts or omission which is deemed to constitute a contravention, supporting facts and justification and the period for the utilities to make objection with respect to the penalties issued.⁷⁵⁸

Publication of these notices is obligatory as well as the serving of copies of such notices to the utilities and other regulatory bodies.⁷⁵⁹ There is a good practice by OFWAT in publishing these notices on its website.⁷⁶⁰ Its enforcement policy and statement of policy on financial penalty⁷⁶¹ policy is also published. Hence, most of Macrory's sanctioning framework (with respect to transparency) above has been incorporated by legislation⁷⁶² and also practiced by OFWAT, an example being that

⁷⁵⁵Ibid s 22A (4)

⁷⁵⁶Ibid s 22A (5)

⁷⁵⁷Ibid s 22A (1) (a)

⁷⁵⁸ See Water Industry (Determination of Turnover for Penalties) Order 2005 SI 2005/ 477, ibid s 22A (4) (b) (c) and (d)

⁷⁵⁹Ibid s 22A (8), (a) (b), (c), (d)

⁷⁶⁰ For example ' Notice of Ofwat's imposition of a penalty on Thames Water Utilities Limited' (OFWAT, 2008)

<[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/not_fne_tms_gssfailureimp.pdf/\\$FILE/not_fne_tms_gssfailureimp.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/not_fne_tms_gssfailureimp.pdf/$FILE/not_fne_tms_gssfailureimp.pdf)> accessed February 3rd

⁷⁶¹ United Kingdom, *Ofwat's Approach to Enforcement*

also *Section 22A Water Industry Act 1991: Statement of policy with respect to financial penalties* (Ofwat) <http://www.ofwat.gov.uk/regulating/enforcement/pap_pos_101124statementpenalties.pdf> accessed July 1, 2011

⁷⁶² Regulatory Enforcement and Sanctions Act 2008, 2008 c.13 contains lengthy transparency requirements on enforcement (See s.64) but this Act is binding to OFWAT, only with respect to s.72-73: "Duty not to impose or maintain unnecessary burdens"

which concerns Thames Water⁷⁶³ and United Utilities.⁷⁶⁴ Responses from the utilities and their representations expressing disagreement or objection with respect to facts, circumstances and methodologies raised by OFWAT are also available in the public domain, as a matter of good practice.⁷⁶⁵

5.3.8. Investment

Determination of a utility's investment priorities can be a contentious issue. As discussed in Chapter 2 (Analytical Framework), prices, network expansion, drinking water quality and the environment are the four main concerns of the regulatory trade-off. In EU countries such as England, there is little discretion with respect to drinking water quality and effluent standard and with almost full coverage, network expansion is not as contentious as in developing countries, although sewerage networks that are over capacity are still a problem and require investment to expand and upgrade.

Thus, having almost more full (almost more full – unusual to put all these together!) coverage does not mean that there will be no other trade-offs with respect to

⁷⁶³ The notice is divided into several sections, among others: Identification of relevant regulatory provisions, facts and matters giving rise to the contravention, penalties, OFWAT's reasons for considering it appropriate to impose a penalty, assessment of the amount of the penalty and summary of representations received by OFWAT and OFWAT's response to these representations. *Notice of Ofwat's proposed variation to its proposal to impose a penalty on Thames Water Utilities Limited* (Ofwat)

<http://www.ofwat.gov.uk/regulating/enforcement/enforcenotices/not_fne_tms_propfine090108.pdf> accessed June 7, 2011

⁷⁶⁴ , *Notice of Ofwat's proposal to impose a penalty on United Utilities Water Plc*

⁷⁶⁵ Wright, C., *Memorandum: United Utilities Water Proposed Penalty – Representations of United Utilities Water* (“UUW”) (2007)

<http://www.ofwat.gov.uk/regulating/enforcement/enforcenotices/res_stk_nwt_penaltynotice_220607nwt_annex.pdf> accessed July 1, 2011

investment made. There are still pressures to curtail carbon emissions, repair leakages, invest in sewers and lower charges. Utilities' duties to invest in sewerage is, as discussed by Hendry, a qualified duty, as it must be balanced against other duties as discussed above.⁷⁶⁶ The Marcic litigation at the House of Lords epitomises this balancing principle. Marcic had his property flooded due to lack of investment in sewerage in his neighbourhood by Thames Water. Nevertheless, the Court held that the duty to invest is not absolute as it must be balanced against other duties, constrains consumer recourse within available regulatory remedies and overrules other private law actions.⁷⁶⁷ This signifies that utilities' investment decisions in sewerage investment has winners and losers. Since litigation efforts have been overruled, the most appropriate way is to integrate the losing stakeholders in the participatory mechanism where they can voice their concerns. A prerequisite for this is for the utilities and the regulatory bodies to disclose reasonings behind their decision not to invest in sewerage capacity expansion and to outline and explain to the losing stakeholders how their concerns are taken into account and reflected in future utilities' investment policy.

The next important issue is leakage. In a report commissioned by English regulatory bodies, it was revealed from a stakeholder survey that leakage and

⁷⁶⁶ Hendry, 'An Analytical Framework for Reform of National Water Law' p. 322

⁷⁶⁷ Marcic v Thames Water Utilities Ltd [2003] UKHL 66 (04 December 2003) ; See sections 5.3.6 (Service Level and Customer Service) and 5.3.7 (Non Compliance) above

excessive profits are among the three main concerns about water utilities.⁷⁶⁸ For the companies, leakage repairs and profit do not always come together.

It is occasionally cheaper for companies that have a surplus of water resources (and therefore a low marginal cost) to “treat and leak” water rather than to repair the leakages.⁷⁶⁹ There is no problem with this practice until bulk water resources become scarce, for example, due to drought, as occurred in Yorkshire in 1995.

The drought that struck Yorkshire in 1995 was rather unanticipated as it was preceded by a wet winter leading to a maximum groundwater level and fully recharged reservoirs.⁷⁷⁰ The utilities, Yorkshire Water Services (YWS), had been paying high dividends to its parent companies instead of allocating the funds to manage its *headroom*⁷⁷¹ properly.⁷⁷² With leakage level high and customer awareness programmes failing to constrain demand⁷⁷³ YWS had no other option but to enforce

⁷⁶⁸ Corr Willbourn Research & Development, *EXECUTIVE SUMMARY of Deliberative Research concerning Consumers' Priorities for PR09 for the Water Industry Stakeholder Steering Group*, (2009) <http://www.ofwat.gov.uk/pricereview/pr09phase1/pap_rsh_pr09conspriorexecsumm.pdf> accessed May 10th, 2011 p.12 The report continues: “All respondents felt that the rate of leakage was unacceptable. ..While some respondents were willing to accept a slight... increase in bills to fund leak repairs the majority felt that the cost of repairs should be met from profits until the leakage is reduced considerably.” See p. 17

⁷⁶⁹ Bakker, *An uncooperative commodity: Privatizing water in England and Wales* p. 90

⁷⁷⁰ Bakker, K.J., ‘Privatising water, producing scarcity. The Yorkshire drought of 1996’ 76 *Economic Geography* 4

⁷⁷¹ *Headroom* is a margin between supply and demand. According to OFWAT, ‘Target Headroom’ is the minimum amount of headroom needed to meet demand, “taking into account supply and demand uncertainty such as the temporary loss of a water resource” *Security of supply 2006-07 – supporting information* (Ofwat) <http://www.ofwat.gov.uk/regulating/reporting/rpt_sos_2006-07secopsupplyinfo.pdf> accessed May 17, 2011

⁷⁷² Bakker, ‘Privatising water, producing scarcity. The Yorkshire drought of 1996’

⁷⁷³ There was public discontent towards Yorkshire Water even before the drought occurred, among other matters related to the pollution of the River Aire and the failed campaign of a consumer activist to

emergency drought orders which authorised them to, among other actions, ban all non essential water uses⁷⁷⁴ and abstract water from other sources.⁷⁷⁵ These had significant implications for the environment which prompted the authorities to artificially aerate some rivers and conduct ‘fish rescue’.⁷⁷⁶

The legal obligation to repair leakages, however, is never straightforward since “treat and leak” can be more economical than repairing leakage, and this is also true in legislative terms. The WIA under s.37 (1) requires utilities to arrange for (a) the supplies of water to premises in their respective supply area⁷⁷⁷ and for (b) “*maintaining, improving and extending the water undertaker’s water mains and other pipes*”⁷⁷⁸. However, the provision continues “*as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part*”.⁷⁷⁹ OFWAT’s ‘translation’ of this provision is to impose the policy which requires utilities to fix leakage, to the extent that the cost for doing so is less than the cost of not fixing it, which is calculated from environmental damages and the cost of developing new water sources to offset the leak.⁷⁸⁰

become elected onto the utilities’ board. See Haughton, G., ‘Private profits–public drought: the creation of a crisis in water management for West Yorkshire’ 23 *Transactions of the Institute of British Geographers* 419 The utilities’ declining popularity may have contributed to the failure of the customer awareness programme designed to curtail water demand.

⁷⁷⁴ Water Resources Act 1991 s 76

⁷⁷⁵ Water Resources Act 1991 s 77

⁷⁷⁶ Bakker, ‘Privatising water, producing scarcity. The Yorkshire drought of 1996’

⁷⁷⁷ Water Industry Act 1991 (England) s 37 (1) (a)

⁷⁷⁸ *Ibid* s 37 (1) (b)

⁷⁷⁹ *Ibid* s 37 (1)

⁷⁸⁰ ‘Leakage’ (*Ofwat*) <<http://www.ofwat.gov.uk/consumerissues/rightsresponsibilities/leakage/>> accessed May 19th. This approach is called SELL, which stands for the “Sustainable Economic Level of Leakage” ‘PR09/20: Water supply and demand policy’ (*Ofwat*, 2008)

Prior to determining final prices, companies are obligated by OFWAT to submit their “final business plans” (including other information such as the June Return).⁷⁸¹ This document contains investment programmes that companies are making in the following five years after the Price Determination. This includes, for example, network expansion, maintenance of ageing assets, including climate change management plans.⁷⁸² Each company publishes their draft business plans on their website and OFWAT compiles a link to them in its’ website.⁷⁸³

The Leakage target of each company is a part of the 5 Year Price Determination (published by OFWAT). OFWAT sets the target for each company yearly in terms of megalitres per day (Ml/d).⁷⁸⁴ In the present system, the leakage target is part of the security of supply index (SOSI) which is also used by OFWAT to impose price limit to companies. If a company fails to fulfil its SOSI level⁷⁸⁵ as has been targeted in the Final Price Determination, OFWAT will count this as a shortfall

<http://www.ofwat.gov.uk/pricereview/pr09phase2/pr09phase2letters/ltr_pr09_watersupdempol> accessed May 19, 2010; By the time this thesis is written, OFWAT reports that all companies’ level of leakage will be at a sustainable level. See also United Kingdom, *Providing Best Practice Guidance on the Inclusion of Externalities in the ELL Calculation: MAIN REPORT, Appendix 2 (part 1)*, (2011) <http://www.ofwat.gov.uk/pricereview/pap_pos_pr09supdempolapp2-1.pdf> accessed May 19th, 2011

⁷⁸¹ Ofwat, ‘Overview of the Business Plan Information Requirements for PR09’ (*Ofwat*) <http://www.ofwat.gov.uk/pricereview/pr09phase1/pap_con_bpr09inforeq.zip> accessed August 20, 2011

⁷⁸² Anglian Water, ‘PR09 Final Business Plan, Part A: The Company Strategy’ (*Anglian Water*) <http://www.anglianwater.co.uk/_assets/media/Proposed_business_plan.pdf> accessed August 18, 2011

⁷⁸³ Ofwat, ‘Periodic review 2009: water & sewerage companies’ final business plans - one page summaries’ (*Ofwat*) <http://www.ofwat.gov.uk/pricereview/pr09phase3/sub_fbp_pr09partasumm> accessed August 20, 2011

⁷⁸⁴ Ofwat, ‘Future water and sewerage charges 2010-15: Final determinations’ (*Ofwat*) <http://www.ofwat.gov.uk/pricereview/pr09phase3/det_pr09_finalfull.pdf> accessed August 20, 2011 See Table 19: Leakage assumptions 2010-11 to 2014-1

⁷⁸⁵ Ofwat, ‘Security of Supply’ (2011) <<http://www.ofwat.gov.uk/publications/securityofsupply>> accessed November 28, 2011

and penalise the companies by not including it as ‘expenditure’ in the next periodic review which means that the cost will be borne by the company themselves. Alternatively, if the matter is considered serious, OFWAT can interpret the company’s failure to repair leakage as a violation of s 37 (1), which provides them with the authority to invoke enforcement action (under ss. 18, 19 and 22 A – see Section 5.3.7. on **Error! Reference source not found.**). Companies sometimes disagree⁷⁸⁶ with OFWAT’s interpretation, but choose to accept s.19 enforcement (undertaking) rather than being fined by OFWAT.

Announcement of a company’s failure to achieve its leakage target is an important step as it may create pressure on the company to fulfil its target. OFWAT may “name and shame” the companies in its annual report,⁷⁸⁷ or through a separate press release.⁷⁸⁸ The 2009-2010 report names six companies for failing to meet their

⁷⁸⁶ In a letter to OFWAT Chairman accepting s.19 undertaking, RWE Thames Chief Executive stated: “Although it in no way diminishes the agreement to which I have referred, as you know we cannot accept that the current situation is such to constitute a contravention of s.37”. Jeremy Pelczer, Leakage and Security of Supply, Undertaking Under s.19 Water Industry Act 1991 (2006) <http://www.ofwat.gov.uk/regulating/enforcement/not_fne_tms_undleakossec19.pdf> accessed May 23, 2011

⁷⁸⁷ Announcement of leakage target was included in OFWAT’s *Security of supply, leakage and water efficiency* issued annually. Currently, company’s leakage performance is reported in the *Service and delivery – performance of the water companies in England and Wales*’.

⁷⁸⁸ Ofwat, *Ofwat: Meeting the demand for water, Twenty-fourth Report of Session 2006–07* (2007) <<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpubacc/286/286.pdf>> accessed June 13, 2011 p.13

leakage target and explains that OFWAT has increased their reporting requirement.⁷⁸⁹
The report was widely quoted on the media.⁷⁹⁰

Disclosure of the companies' draft business plans will enable stakeholders to assess and participate in determining priorities for their neighbourhood whereas disclosure of companies' leakage conditions enables stakeholders to assess if their supply security is threatened and subsequently determine the course of action that is acceptable to them. If the leakage rate is inefficient, more investment will have to be undertaken. This course of action may mean that less money is allocated to pay dividends and/or charges would increase.

If a regulator perceives that the investment will have to be financed by customers through price increases, disclosure could help to increase the acceptability of a price increase. If, on the other hand, companies fail to achieve their leakage target, disclosure would enable customers and other stakeholders to persuade the regulator to take action against the utility to force them to comply and finance it with their own budget.

5.3.9. Price Determination

⁷⁸⁹ United Kingdom, *Service and delivery – performance of the water companies in England and Wales 2009-10* (2010) <http://www.ofwat.gov.uk/regulating/reporting/rpt_los_2009-10.pdf> accessed June 13, 2011 p.7

⁷⁹⁰ See, for example, Mark King & agencies, 'Quarter of water companies neglecting leakage duties, says Ofwat' *Guardian* (Thursday 28 October 2010) <<http://www.guardian.co.uk/money/2010/oct/28/quarter-water-companies-leakage>> accessed June 13, 2011 also 'Six water companies 'fail to hit leakage targets' (*BBC.co.uk*, 2010) <<http://www.bbc.co.uk/news/uk-11641600>> accessed June 9, 2011

Legislation regulates price review in broad terms, referring to it together with other matters as “Determinations made under conditions of appointment”.⁷⁹¹ The company’s licence further regulates this in more detail, by stipulating the intervals for price reviews⁷⁹² and limiting the increase of standard charges or the “K” factor.⁷⁹³

There were four phases⁷⁹⁴ to the 2009 Price Review (PR-09), and ranges from March 2007 to September 2010. In the first stage, OFWAT publishes a long-term strategic direction statement and the companies give response. Various consultations on OFWAT’s approach and methods for the Price Review, the information requirements and stakeholder research are conducted. At the end of the first phase OFWAT issues the final price review methodology and information requirement.⁷⁹⁵ In the second phase, companies submit their draft business plan (the PR 09 requires a 25 year outlook) in addition to their annual “June Return” data. A joint research on customers’ views of their draft business plan is carried out. OFWAT will publish a summary of the company’s draft business plan and its overall view of the company’s draft. At the end of phase 2, OFWAT issues the reporting requirement for the final business plan.⁷⁹⁶

⁷⁹¹Water Industry Act 1991 (England) s 12

⁷⁹² , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition B (Charges) para 1.2

⁷⁹³ Ibid Condition B (Charges) para 1.1

⁷⁹⁴ Ofwat, ‘Price Review 2009’ (*Ofwat*) <<http://www.ofwat.gov.uk/pricereview/pr09faqs>> accessed February 17, 2012

⁷⁹⁵ Ofwat, ‘Price review 2009 timeline’ (*Ofwat*) <http://www.ofwat.gov.uk/pricereview/prs_web_pr09timeline> accessed February 17, 2012

⁷⁹⁶ Ibid

At the beginning of phase 3, companies submit and publish their final business plan and their “June Return” data.⁷⁹⁷ OFWAT publishes the draft determination for comment and holds meetings with companies and CC Water to discuss the draft. At the end of phase 3, the final determination is published. At the beginning of phase 4, companies can either decide to accept OFWAT’s decision or refer their objection to the Competition Commission.⁷⁹⁸ If no referrals are made, OFWAT approves the charging scheme. Finally, the new price limit will take effect and the whole process is evaluated. In all of these phases, information and documents are published by both OFWAT and the companies.

Legislation acts generally as a facilitator to transparency in price reviews (see section 5.3.5). All of OFWAT’s research and inquiries, framework and methodology for price review, consultations, information requirement, companies draft business plan, CCWater stakeholder’s research and the Determination (both the draft and final Determination) are available on either OFWAT’s website or the companies’. The June Returns which are submitted by the companies annually to OFWAT and feed into the Price Review are also published on OFWAT’s website. It has been OFWAT’s policy since 2008 to keep companies accountable by publishing their annual returns soon after they are submitted every June, each year.⁷⁹⁹ In practice, before publishing the

⁷⁹⁷ Ibid

⁷⁹⁸ Ibid

⁷⁹⁹ *Ofwat’s strategy – taking a forward look* (2008)
 <http://www.ofwat.gov.uk/aboutofwat/reports/forwardprogrammes/rpt_fwd_ofwatstrategy.pdf>
 accessed May 24, 2011

June Return, OFWAT sends letter to the companies that it intends to publish the June Return, with commercial in confidence information being excised.⁸⁰⁰

5.3.10. Redress

Every stakeholder involved in the regulatory process should be entitled to redress mechanisms. The role of transparency is to make sure that those in need of justice understand where to access it and that the process is accountable. Redress mechanisms are available to both the regulated companies and customers.

5.3.10.1. Redress for the regulated companies

Regulated companies have access to a redress mechanism if they are not satisfied by the price determination, sanction or penalty imposed by OFWAT and by other regulatory decisions such as mergers. As discussed above, OFWAT may impose financial penalties on the utility for contravention of its licence condition or for failing to achieve performance standards.⁸⁰¹ Companies can appeal to the High Court if they do not accept the penalty imposition by OFWAT, or with respect to its amount and date of payment.⁸⁰²

Companies can also disagree with the Price Determination made by OFWAT for reasons such as the need to invest more in assets or in conducting operation and

⁸⁰⁰ Ofwat, 'Publication of the June return 2009'

⁸⁰¹ Water Industry Act 1991 (England) s 22A (1) (a)

⁸⁰² Ibid s. 22E (1)

maintenance programmes.⁸⁰³ The right for such ‘appeal’ is actually not direct as the company cannot directly commence proceedings against OFWAT at the Competition Commission. What the legislation does is to enable the companies to require OFWAT’s Director to refer the case to the Competition Commission⁸⁰⁴ and this facility is further elaborated in the Licence condition.⁸⁰⁵

Finally, the companies can appeal to the Competition Appeal Tribunal (CAT) against any merger decision made by the Competition Commission. As previously discussed (see section 5.2.1. above) the OFT is tasked with referring water companies’ mergers to the Competition Commission⁸⁰⁶, except if they are excluded.⁸⁰⁷ The CC can decide to entirely prohibit the proposed merger or impose partial prohibition or compel divestiture. When the companies disagree with this decision, they can appeal to the CAT for a review, which in turn may either dismiss the application, or quash the whole or part of the decision.⁸⁰⁸ The UK competition law provides other recourse for

⁸⁰³ This was the reason behind Bristol Water’s rejection of OFWAT’s Price Limit for the 2010-2015 period. See Bristol Water, ‘Bristol Water Rejects Ofwat Price Decision’ (*Bristol Water*,) <<http://www.bristolwater.co.uk/news/mainNews.asp?newsID=551>> accessed May 31, 2011

⁸⁰⁴ Water Industry Act 1991 (England) s 12 (2) and (3)

⁸⁰⁵ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition B (Charges)

⁸⁰⁶ Water Industry Act 1991 (England) s. 32. Among the considerations made by the CC is whether the merger will hinder OFWAT’s task in comparing different water enterprises against the benefits of the merger to consumer. See schedule 4ZA of *ibid* 1991. See also Hendry, ‘An Analytical Framework for Reform of National Water Law’ p. 359

⁸⁰⁷ Water Industry Act 1991 (England) s.33

⁸⁰⁸ Enterprise Act, s 120

the companies to appeal to the CAT against the decision of the regulator, as evidenced by Albion's case against the third party access pricing decision of OFWAT.⁸⁰⁹

5.3.10.2. Redress for customers

Customers are entitled to service standards as outlined in the GSS Regulation (see section 5.3.6).⁸¹⁰ Complaints about bad service should be directed to the companies, which in many cases would entitle customers to receive a certain amount of money within the limits as prescribed by the GSS Regulation. Although customers can contact CC Water at any stage of their complaints, only when they have exhausted measures available at the water company will CC Water or OFWAT carry out measures to settle their dispute.

OFWAT has the power to settle disputes on some matters.⁸¹¹ Some of the disputes are settled by OFWAT by making "Determinations".⁸¹² "Determinations"

⁸⁰⁹ Albion was seeking to use Dwr Cymru's network to supply water. However, the access price offered was considered unfair and excessive. In its review, OFWAT reinforced Dwr Cymru's pricing through its Decision. Albion appealed to CAT which held Dwr Cymru to be in abuse of its dominant position and the pricing "unfair and excessive". See *Albion Water Limited v Water Services Regulation Authority*, Case Nos: 1034/2/4/04 (IR)1046/2/4/04, Judgment 9 April 2009 [2009] CAT 12 The appeal was granted under s.46 and 47 of the Competition Act 1998 c 41. See also The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004 No. 1261 and *Competition Act 1998 Application in the Water and Sewerage Sectors* (Ofwat 2000) <[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/ca98application.pdf/\\$FILE/ca98application.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/ca98application.pdf/$FILE/ca98application.pdf)> May 21st, 2012

⁸¹⁰ The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008

⁸¹¹ This includes disputes on expenses incurred when making connections with mains, conditions imposed by water utilities before a connection is made, requirements for metering, the terms and conditions for non domestic customers, financial requirements to connect to a sewer or lateral drain, location and timescale for providing sewer or lateral drain, appeals regarding the adoption of private sewers, refusal of the right to connect to public sewer, the cost to connect to public sewer, right to be charged by reference to volume, and the laying of pipes on private land. See respectively Water

made under s.30A by OFWAT are considered to be final and enforceable “*as if it were a judgment of a county court*”.⁸¹³

OFWAT maintains a record of every dispute brought to it. A Report on a GSS Dispute typically consists of several parts: OFWAT’s power to issue the Determination,⁸¹⁴ the factual background and chronology, the relevant part of the GSS regulation applicable, the views of the disputants and OFWAT’s considerations and Determination.⁸¹⁵ Although the value of each case may be economically insignificant, these Reports are important in two respects. First, it creates incentives for companies to comply since it makes clear that even seemingly economically insignificant disputes will be processed. Second, it creates a sense of fairness among the disputants as the reasoning of the Determination and the relevant legal provisions are considered.

Customers can also refer their problem to CC Water in their area. The Water Act 2003, amending the WIA 1991, provided wide authority to CC Water to conduct investigations into customer complaints, except for some situations which are within

Industry Act 1991 (England) sections 45 (6A), 47 (3A) and (3B), 49 (3) (b), 56, 99, 101, 105 (1) (Not all sewers belong to the companies, some of them are owned by individual or “Private Sewers”. The owners of such sewers or lateral drains may ask the company to ‘adopt’ the sewers – or they can object to the company’s initiative in adopting their sewer. This clause provides mechanism to settle any dispute arising from such adoption. Also sections 106 (4); 150A (6b), 107 (4A), 144A (4), 181 (1) and (2)

⁸¹²Ibid s 30A

⁸¹³Ibid s 30A (5) (b)

⁸¹⁴SI 2008 No. 594 s 17

⁸¹⁵*Ofwat's Final Report on a Dispute Between Dr Lashley and Anglian Water About Entitlement to Payment Under the Guaranteed Standard Scheme (GSS)* (2005) <http://www.ofwat.gov.uk/consumerissues/complaints/determinations/gss/det_gss_200911lashleyanh.pdf> accessed May 28, 2011

OFWAT's authority to investigate,⁸¹⁶ or constitute an offence.⁸¹⁷ If the matter can be solved under OFWAT's power to make Determinations, CC Water can refer such matter to OFWAT if the complainant agrees.⁸¹⁸ CC Water is not required to investigate if the water companies have not been given a reasonable opportunity to address the complaint.⁸¹⁹ In practice, customers are required first to exhaust remedies provided to it by the companies.⁸²⁰ Despite its wide powers to conduct investigation, unlike OFWAT which announces the results of its enquiries, there is no clarity as to CC Water's investigations procedure and its results.

Access to the Ombudsman is available for customers who are not satisfied by OFWAT's or CC Water's performance, including that relating to complaints or disputes. The Ombudsman makes sure that complaints about water services are addressed to CC Water before it is brought to them.⁸²¹ DWI, DEFRA and the Environment Agency may also receive complaints in accordance with their respective jurisdiction.

5.4. Corporate Governance

⁸¹⁶Water Industry Act 1991 (England) s.29 (3) and (4) These are matters such as the alleged violation of licence condition, imposition of penalty, the laying of pipes or conducting sewerage work on street.

⁸¹⁷Ibid s. 29 (5). This matter should be referred to the Secretary of State or the Welsh Assembly (for Wales)

⁸¹⁸Ibid s.

⁸¹⁹Ibid s 29 (8) (b)

⁸²⁰'How do I complain about my water and/or sewerage company?' (CC Water,, 2010) <http://ccwater.custhelp.com/app/answers/detail/a_id/417> accessed May 31, 2011 *"If you have followed your company's complaints procedure but remain dissatisfied, you can ask us to look at your complaint. We will tell you how we can take your matter forward and what resolution, if any, you can expect from your company"*

⁸²¹ 'Gas, electricity and water' (Parliamentary and Health Service Ombudsman,) <<http://www.ombudsman.org.uk/make-a-complaint/if-we-cant-help/gas-electricity-and-water>> accessed May 31, 2011

The Companies Act of 2006 imposes tough disclosure rules on companies. As water and sewerage undertakers have to be in the form of a company,⁸²² they are also covered by this rule. Transparency has always been a part of the corporate governance debate. The problem with this is that the original idea of “corporate governance” has primarily been centered upon the relationship between management and shareholders while leaving other stakeholders such as consumers as somewhat ‘outsiders’ to the company.⁸²³ Consumers of a utility company, on the other hand, hold a very important stake in the company. Their stakes may not be in the form of shares, but a guaranteed purchase of the utility product. On the other hand, the product itself, water, is essential to the consumer and cannot be substituted with other goods. In a regulated natural monopoly setting, a water consumer has no choice but to buy from the company and the company has no choice but to sell to them.

5.4.1. Corporate structure and the Board

The 2006 Companies Act (CA 2006) obligates companies to maintain registers, among others, a register of directors⁸²⁴ containing their names⁸²⁵, date of birth, their service address⁸²⁶ and other identities, which should be available for

⁸²²Water Industry Act 1991 (England) s. 6 (1)

⁸²³ Hannigan, B., *Company Law* (Oxford University Press 2009) p.115

⁸²⁴ Companies Act 2006 c.46 s.162 (1)

⁸²⁵ Ibid s.163 and 164

⁸²⁶ Ibid s.163 (1) (b)

company members at no charge or by any other person in accordance with a prescribed fee.⁸²⁷ The directors' residential addresses,⁸²⁸ however, should be kept in the register but not disclosed, unless under certain circumstances.⁸²⁹

Rules on appointment under CA 2006 are very general, and are concerned primarily with age.⁸³⁰ For removal before the term of office is ended, a resolution is required⁸³¹ and a director can defend himself against such removal at the meeting.⁸³² There is no requirement of ex-ante public disclosure, but there is a duty to notify Companies House when a person ceases to become a director.⁸³³ This register of directors at Companies House is available for public access for a fee.

The Companies Act also obligates companies to keep a register of members,⁸³⁴ containing their names and addresses,⁸³⁵ their shareholdings⁸³⁶ – including the type of shares and the amount paid,⁸³⁷ which must be kept available for inspection (free of charge for members and for a fee for anyone else).⁸³⁸ Refusal to disclose must go through an application to the court by the company which decides

⁸²⁷ Ibid s.162 (5)

⁸²⁸ Ibid s.165

⁸²⁹ Ibid s.240, 243 (2), See also The Companies (Disclosure of Address) Regulations 2009, SI 2009/214

⁸³⁰ Companies Act 2006 c.46 ss 154-161

⁸³¹ Ibid s.168 (1)

⁸³² Ibid s.169 (3)

⁸³³ Ibid s.167

⁸³⁴ Ibid s.113 (1)

⁸³⁵ Ibid s. 113 (2)

⁸³⁶ If companies issue shares based on classes and designation, or vary rights attached to sharers, or create a new class of shares, information containing their class and designation and its variations must be notified to the registrar See ibid ss.636-640

⁸³⁷ Ibid s.113 (3)

⁸³⁸ Ibid s.116 (1)

that the request is “*not sought for a proper purpose*”.⁸³⁹ There is also a restriction for persons who obtain such information not to disclose it to another person who would use it for “*a purpose that is not a proper purpose*”.⁸⁴⁰ What is deemed to be a “proper” or “improper” purpose is not explained on the CA 2006, but it has been suggested that those which are intended for fraud, intimidation or harassment, mass mailings or which relate to the offering of securities are improper.⁸⁴¹ Ultimately, this is something that the Court must decide on a case by case basis.

A large chunk of information shall be included in the “Directors’ Report”, the contents of which are similar from company to company although small companies can be exempted from some disclosure duties.⁸⁴² The Director’s Report must contain the identities of directors, the company’s principal activities and a business review. The implementing regulation to the CA 2006⁸⁴³ adds some more information to be disclosed, among others, the company’s asset value and political donations and expenditure.⁸⁴⁴ For quoted companies there are obligations to include directors’ salaries and remuneration policy, some details of its service contracts and, if the shares

⁸³⁹ Ibid s.117 (3)

⁸⁴⁰ Ibid s.119 (2) There is no strict definition as to what purpose is considered “not proper”, but

⁸⁴¹ Institute of Chartered Secretaries and Administrators, ‘ICSA Guidance on Access to the Register of Members: Proper Purpose Test’ (2007) <<http://www.icsa.org.uk/assets/files/pdfs/Groups/Registrars/ICSA%20Guidance%20on%20Access%20to%20Register%20of%20Members.pdf>> accessed June 7, 2011

⁸⁴² Companies Act 2006 c.46 s. 415A (2), Under s.417 (1) small companies are exempted from the obligation to create a business review under its Director’s Report

⁸⁴³ SI 2008/410 The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008

⁸⁴⁴ SI2008/410, Schedule 7

which are traded have voting rights, the rights, privileges and limitations attached to it such as restriction on transfer of securities.⁸⁴⁵

Such information is included in companies' "Annual Accounts and Reports" which must be circulated to companies' members, holders of debentures and any other parties entitled to receive notices of the general meetings. The duties for disseminating the report for quoted companies are extended: its annual account and report must be available on a website, the access to which must be free of charge.⁸⁴⁶

5.4.2. Related party transaction

Under the CA 2006, directors have a duty to avoid CoI⁸⁴⁷ and to declare interest in a planned⁸⁴⁸ or existing⁸⁴⁹ transaction or arrangements at directors' meetings or through written⁸⁵⁰ or 'general' notices.⁸⁵¹ There are obligations that companies must note with respect to related undertakings and preparing group

⁸⁴⁵ SI2008/410, Schedule 8

⁸⁴⁶ Companies Act 2006 c.46 s.430 (3)

⁸⁴⁷ Ibid s.175 (1)

⁸⁴⁸ Ibid s.177 (1)

⁸⁴⁹ Ibid s.182 (2)

⁸⁵⁰ Ibid s.184 The notice will be regarded as forming a part of the directors' next meeting and the document forms a part of the minutes of the meeting

⁸⁵¹ Ibid s.185 This applies only when given at directors' meeting. This is also applicable when the parties affiliated with the director are deemed to have an interest in that transaction. See s.252 on the explanation of affiliated persons

accounts.⁸⁵² Disclosure⁸⁵³ of companies' accounts is required if material transactions are entered into with related parties not "under normal market conditions".⁸⁵⁴

OFWAT takes further measures to ensure that the utilities it regulates are appropriately ring-fenced and transact in an arm's length manner. This is conducted by imposing some ring-fencing requirements directly in the company's licence condition⁸⁵⁵ and by issuing a series of Regulatory Accounting Guidelines (RAG). The RAGs themselves are not binding *per se* but facilitate compliance as they are used by the companies as a reference when submitting their regulatory accounts.⁸⁵⁶ Submission of the regulatory accounts is a part of the licence condition⁸⁵⁷ and the failure to comply with this requirement may trigger penalty sanctions.⁸⁵⁸

⁸⁵² Ibid s. 409

⁸⁵³ The Large and Medium sized Companies and Groups (Accounts and Reports) Regulations', Statutory Instrument, SI 2008/410 para 72 (1). The SI obligates disclosure of the nature of related party relationships and amount of transactions.

⁸⁵⁴ See also Accounting Standards Board, *Amendment to FRS 8 Related Party Disclosures: Legal Changes 2008* (2008) which has a higher threshold as it requires disclosures of all related party transactions, even if made under normal market conditions

⁸⁵⁵ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition F: Accounts and accounting information. In para 1.1 of Condition F, it is stipulated that the purpose of the licence condition is to separate the financial affairs of the 'Appointed Business', to ensure that no cross subsidy between the regulated company and its "Associated Companies" exist and to ensure that any transfer of assets or financial support to its associated companies does not affect the regulated companies' function as an undertaker.

⁸⁵⁶ They are occasionally referred to in the licence condition. See *ibid* Condition B para 13.3 (3) and Condition F para. 6.8 (i)

⁸⁵⁷ *Ibid* Condition F: Accounts and accounting information, para 9.3 obligate companies to send regulatory accounts to OFWAT's Director 'as soon as reasonably practicable' and in any event no later than July 15 of each year.

⁸⁵⁸ Water Industry Act 1991 (England) s.22A

A Related Party Transaction is part of the data that utilities submit to OFWAT in their June Return, forming Chapters 30 and 31 (“Transactions with Associated Companies”).⁸⁵⁹ These chapters were drafted in accordance with RAG 5.04 on Transfer Pricing.⁸⁶⁰ Chapters 30 and 31 reiterate the company’s duty – under its Licence Condition F⁸⁶¹ – to trade at arm’s length from associate companies to ensure that no cross subsidy occurs and requires the companies’ directors to provide a statement of compliance with the condition F.⁸⁶² Unfortunately, however, information submitted under Chapters 30 and 31 is labeled “Commercial in Confidence”.⁸⁶³

In most statements issued by the utilities (for example, Sutton & East Surrey,⁸⁶⁴ United Utilities⁸⁶⁵ and Yorkshire Water⁸⁶⁶) to accompany the public domain version of the June Return data, companies categorise Chapters 30 and 31 under category 1 (on the categorisation of excised information see section 5.3.5 above “OFWAT’s general policy on disclosure”), that is, information which if disclosed in

⁸⁵⁹ Ofwat, *Chapters 30 & 31: Transactions with Associated Companies, June return reporting requirements and definitions manual 2011, Issue 1.0 - January 2011*. The definition of ‘Associated Companies’ refer to Financial Reporting Standard 8 and International Accounting Standard 24

⁸⁶⁰ *Guideline for transfer pricing in the water industry; Regulatory Accounting Guideline 5.04* (Ofwat 2007) <http://www.ofwat.gov.uk/regulating/gud_rag_5transpric_504.pdf> accessed June 9, 2011

⁸⁶¹ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition F

⁸⁶² Ofwat, *Chapters 30 & 31: Transactions with Associated Companies, June return reporting requirements and definitions manual 2011, Issue 1.0 - January 2011* Companies are also required to enact procurement procedures which comply with RAG 5.04. The chapters also provide guidelines on how to record and report transactions with associated companies. See p.3

⁸⁶³ Ibid p.1

⁸⁶⁴ Sutton and East Surrey Water PLC, *Annual Report to the Water Services Regulatory Authority June 2010, Public Domain Submission* <<http://www.waterplc.com/userfiles/file/JuneReturn2010.pdf>> June 9, 2011

⁸⁶⁵ United Utilities, *June Return 2006: Statement to Accompany the Public Domain Version*

⁸⁶⁶ Yorkshire Water, *June Return 2007: Statement to Accompany the Public Domain Version*

conjunction with other materials (on the June Return data), will have an effect on share prices.⁸⁶⁷ Northumbrian Water,⁸⁶⁸ in the 2007 June Return, considers such information to fall under both category 1 and 2 (category 2 is for information which the affected organisation or individual disagrees to disclose) while Thames Water,⁸⁶⁹ in its 2006 June Return, considers such information to fall under category 4, that is, that the excised information can give potential competitors or a third party a commercial advantage. The invocation of such categories by the companies therefore appears to be arbitrary as there is little consistency between them with respect to the same information, i.e. related party transaction.

One of the purposes of related party transaction disclosure in utilities' regulation is to enable customers to track the inflow and outflow of money from the regulated utility to an associated company and to level the playing field for prospective entrants. If related party transaction information is withheld, consumers and other interested parties will not be able to track possible transfer pricing. Excision of the June Return data by the companies, however, is not a guarantee that OFWAT will hold the information if it is being requested through the FoI or EIR regimes. Presumably, OFWAT will argue that such information is exempted under FoI, hence, the information cannot be released. A public interest towards disclosure can be argued, however, if there is a strong suspicion of cross subsidy among the associated

⁸⁶⁷ This is relevant only with respect to companies listed on the capital market

⁸⁶⁸ Northumbrian Water Limited, *June Return 2007: Statement to Accompany the Public Domain Version*

⁸⁶⁹ Thames Water Utilities LTD, *June Return 2006: Statement to Accompany the Public Domain Version*

companies and OFWAT is deemed not to have performed its duty to investigate properly.

5.4.3. Corporate restructuring

The regulator generally has two concerns over the restructuring of a regulated utility: (1) the question of probity, capacity of the new owner and its role in a regulated utility, and, if the restructuring involves the delisting of publicly traded shares, (2) the effect of utilities' "going private" on the loss of comparative information and the absence of capital market pressures on managerial efficiency.

In the UK, OFWAT has no power to block acquisition (although it can refer it to the Competition Commission - see section 5.2.1.5). Hence, the reputation of the new owners and its perceived capacity in the water industry will have no impact on the legality of the acquisition.⁸⁷⁰ Thus, the only thing the English regulator can do is to manage utilities' licence conditions and require them (as part of the licence condition) to provide undertakings from their 'ultimate controller'.⁸⁷¹ Consultations are employed so that OFWAT will have sufficient information in modifying the utility's licence and in understanding the customer's view.⁸⁷² This requires the

⁸⁷⁰ One of the consultation responses, for example, questions the multi-layered structure of 'Macquarie Investors' and doubts their ability to be responsible, reliable and accountable utility owners. See Blaiklock, T.M., *Consultation: "The Completed Acquisition of Thames Water Holdings plc. by Kemble Water Limited"* (Consultation Response) (2007)

⁸⁷¹ This is in order to tackle the complexities of layers of ownerships

⁸⁷² CC Water's response was: "We fear that Thames Water will be seen as a cash cow to be milked for all it is worth... The ownership structure for Thames Water is unwieldy, its corporate governance proposals seriously flawed, and the financing arrangements deeply suspect". CC Water, Consultation: "The Completed Acquisition of Thames Water Holdings plc. by Kemble Water Limited" (CC Water Thames' Response) (2007) .

publication of “consultation papers” containing detailed information surrounding the restructuring.⁸⁷³

With respect to new ownership, OFWAT’s regulatory safeguard is in securing various undertakings from the utility’s UK holding company.⁸⁷⁴ The undertakings cover (i) the supply of all information from the holding company to the regulated utility necessary to comply with its licence condition, (ii) a requirement to refrain from any action that will cause the regulated utility to breach its licence condition and any other statutory obligations, and (iii) guarantee that the regulated utility has no less than one independent non executive director with specific qualifications.⁸⁷⁵

If the restructuring causes the delisting of shares (as was the case with Thames’ acquisition by RWE), the stock exchange public disclosure rules will no longer apply and the company’s performance will no longer be scrutinised by analysts and shareholders. This will, according to OFWAT, “*remove the Director’s ability to compare the market’s ratings [of the company] with other listed owners of licensed water and sewerage utilities [and] would also affect his ability to make judgments*

⁸⁷³ For example *The Completed Acquisition of Northumbrian Water Limited, A Consultation Paper by Ofwat* (2003) <[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/nas_conspaper100603.pdf/\\$FILE/nas_conspaper100603.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/nas_conspaper100603.pdf/$FILE/nas_conspaper100603.pdf)> accessed June 13, 2011 *The completed acquisition of Thames Water Holdings Plc by Kemble Water Limited, A consultation paper by Ofwat* (2007) <http://www.ofwat.gov.uk/industrystructure/capitalrestructuring/pap_con_tms_acquisbykemble.pdf?download=Download#> accessed June 13, 2011

⁸⁷⁴ *Water Industry Act 1991, Section 13 (1) Modification of the Conditions of Appointment of Thames Water Utilities Limited* (2007) <http://www.ofwat.gov.uk/industrystructure/licences/amendments/lic_lmd_tms_conf20071108.pdf> accessed May 24, 2011 Condition P

⁸⁷⁵ Ibid Condition P

about an appropriate cost of capital for the water and sewerage industries".⁸⁷⁶ One of the basic assumptions behind water utilities' divestiture was that water utilities' management will not live a "quiet life" because of the threat of acquisition and that the market, as reflected by the value of stocks listed on the capital market, will provide input to OFWAT on the 'true' value of the company. The capital market and its institutions,⁸⁷⁷ therefore, is an important factor in regulation, without which OFWAT may lose information essential for regulating the companies.

OFWAT's response to this is to require the company to either publish its financial information as if it were listed and subject to the rules of the stock exchange, or re-list its shares or some class of its shares or the parent company of the regulated business list bonds or other financial instruments which would provide some market information, although less than a listed equity.⁸⁷⁸ Although not listed in the stock exchange, Thames publishes its interim and final financial accounts as if it were a listed company.⁸⁷⁹ This is reflected in its modified licence condition.⁸⁸⁰ Thames also

⁸⁷⁶ *The proposed takeover of Thames Water plc by RWE AG: A consultation paper by the Office of Water Services* (Ofwat 2000) <[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/thames_takeover.pdf/\\$FILE/thames_takeover.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/thames_takeover.pdf/$FILE/thames_takeover.pdf)> accessed June 13, 2011 p.5

⁸⁷⁷ These includes the public shareholders, investment banks and appraisals

⁸⁷⁸ , *The proposed takeover of Thames Water plc by RWE AG: A consultation paper by the Office of Water Services* p.5

⁸⁷⁹ Thames Water, *Thames Water Utilities Limited Interim report and financial statements for the six month period ended 30 September 2010* (2010) <<http://www.thameswater.co.uk/cps/rde/xbcr/corp/2010-twul-interim-financial-statements.pdf>> June 13, 2011 p.8

⁸⁸⁰ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition F, 6A.5B

retains bonds.⁸⁸¹ The obligation to retain bonds – although subjected to a lesser disclosure and governance requirement compared to listed shares – will compel the companies to comply with some rules of the stock exchange.⁸⁸² In its latest licence modification for Thames, OFWAT also impose a condition whereby utilities’ accounting statements and auditors’ reports sent to OFWAT (with some exceptions) are published together with its annual accounts (which are prepared under the Companies Act) and its copies be made available to customers upon request.⁸⁸³

In Dwr Cymru’s restructuring, asset ownership of the new company was separated from its operation. The company owning the assets is Dwr Cymru’s parent company, Glas Cymru, a company limited by guarantee which raises finance through debts. The change from equity to entirely debt financing brought a number of important regulatory questions. Among others, OFWAT was concerned that the absence of shareholders means that there is no buffer for ‘shocks’ in case emergency financing is required, unless Dwr Cymru has adequate reserves⁸⁸⁴ and that resort to debt financing means that its credit rating must remain at least at an “investment

⁸⁸¹ Ibid Condition F, 6A.5C: “(effective 2 May 2001) The Appointee shall maintain a Bond and shall use all reasonable endeavours to retain its listing on the London Stock Exchange”.

⁸⁸², *The proposed takeover of Thames Water plc by RWE AG: A consultation paper by the Office of Water Services* p.5

⁸⁸³, *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989 Condition F, 9.4 (2007 Modification) Water Industry Act 1991, Section 13 (1) Modification of the Conditions of Appointment of Thames Water Utilities Limited (Ofwat 2005)*
<http://www.ofwat.gov.uk/industrystructure/licences/amendments/lic_lmd_tms_conf20071108.pdf>
May 24, 2011

⁸⁸⁴ *The proposed acquisition of Dwr Cymru Cyfyngedig by Glas Cymru Cyfyngedig, A consultation paper by Ofwat (2000)*
<[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/glass_final.pdf/\\$FILE/glass_final.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/glass_final.pdf/$FILE/glass_final.pdf)> accessed June 13, 2011 p.12

grade”.⁸⁸⁵ Both of these problems were resolved through amendments of its licence condition, the former by obligating the companies to have adequate financial and management resources and certifying it to OFWAT,⁸⁸⁶ and the latter by obligating Dwr Cymru and companies issuing debt on its behalf to, at all times, maintain an investment grade rating.⁸⁸⁷

Without shares listed on the capital market, however, there will no incentive for Dwr Cymru’s management to be competitive, as there is no threat of acquisition and pressures from shareholders. There may be pressures from lenders, but this could be limited in the form of securing the return of their investment and not to contribute to the long-term efficiency as shareholders would normally demand capital growth.⁸⁸⁸ Appointment and dismissal of Dwr Cymru’s board – due to the absence of shareholders and acquisition pressures – will, therefore, depend solely on the mechanism provided by Glas Cymru, its parent company. OFWAT was concerned

⁸⁸⁵ Companies with “investment grade” rating guarantees are considered to be able to meet its payment obligation. It is a BBB- rating or higher according to S&P’s standard or Baa3 according to Moody’s

⁸⁸⁶, *The proposed acquisition of Dwr Cymru Cyfyngedig by Glas Cymru Cyfyngedig, A consultation paper by Ofwat* p. 22. See also Dwr Cymru’s Licence, *Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989* Condition F, 6A.1(1) (a): “The Appointee shall at all times act in the manner best calculated to ensure that it has adequate [...] financial resources and facilities”, also Condition F 6A.2A and 6b.2B (1) obligating Dwr Cymru’s directors to submit a certificate that it has the financial resources needed to carry out its task for the next 12 months accompanied by statements explaining the main factors justifying it and Condition F 6A.2B (2) obligating the directors to immediately notify OFWAT as soon as they become aware that they may be in financial difficulty

⁸⁸⁷, *Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989* Condition F, 6A.6(1)

⁸⁸⁸, *The proposed acquisition of Dwr Cymru Cyfyngedig by Glas Cymru Cyfyngedig, A consultation paper by Ofwat* p.15

that the Members of Glas Cymru might in the future be captured by a special interest group.⁸⁸⁹

In response to the above problem, OFWAT's strategy was to require Dwr Cymru to publish periodical financial information in line with London Stock Exchange Rules, as if its shares were listed there,⁸⁹⁰ to require that Glas Cymru maintain an incentive scheme to attract a highly qualified board and to have such a scheme be made publicly available and formalised in its Articles of Association.⁸⁹¹ This disclosure obligation is a part of OFWAT's series of efforts to 'intervene' in Dwr Cymru and Glas Cymru's corporate governance⁸⁹² as a result of the loss of capital market pressures. Dwr – as with Thames following RWE's acquisition – was also required to maintain the listing of a financial instrument⁸⁹³ and to publish its accounting statements with its annual accounts and the auditor's report to OFWAT and the copies made available to customers.⁸⁹⁴

Of all 10 water and sewerage companies only one, United Utilities, is, at the moment of writing, a Plc. The rest are Ltds and one company, Yorkshire Water, is a

⁸⁸⁹ Ibid p. 17

⁸⁹⁰ Ibid p.19, *Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989* Condition F 6A.5B(1)

⁸⁹¹, *The proposed acquisition of Dwr Cymru Cyfyngedig by Glas Cymru Cyfyngedig, A consultation paper by Ofwat* p.15

⁸⁹² Ibid. OFWAT requires Dwr Cymru's board to have a majority of non executive directors and to secure undertakings from Glas Cymru, that it will (i) consult OFWAT on any modification of its Articles of Association, (ii) provide information as reasonably required by OFWAT directors as to its activities and finances, (iii) provide necessary information to Dwr Cymru so that it can comply with its licence, and (iv) refrain from any action that will result in Dwr Cymru's breach of its licence.

⁸⁹³, *Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989* Condition F 6A5C(1)

⁸⁹⁴ Ibid Condition F 9.4

company limited by guarantee. Although United Utilities is a Plc, and therefore automatically subject to listing rules, its licence condition contains clauses requiring it to comply with London Stock Exchange listing rules *as if* it were a listed company,⁸⁹⁵ presumably to ensure continuity of information publication and reporting in the event of the company going private.

5.5. Passive Disclosure Rules

There are two pieces of primary legislation granting rights to citizens in order to obtain information held by public bodies in England and Wales, upon request: The Freedom of Information Act 2000 (FoI Act 2000)⁸⁹⁶ and the Environmental Information Regulation 2004 (EIR).⁸⁹⁷ The legal history leading to the enactment of the two instruments is quite different; the former was perceived to be a ‘homegrown’ law while the latter was more an implementation of a European initiative.

The FoI Act 2000 was a result of years of initiatives. Birkinshaw notes that the idea of removing secrecy from the civil service can be traced back to the Fulton Report of 1966.⁸⁹⁸ The Official Secrets Act had been around since 1911. The Labour party attempted to introduce several Freedom of Information Bills from 1978 but had always failed because they lost the election or because the bill was rejected at a later stage. In 1997, the Government published the widely acclaimed white paper “Your

⁸⁹⁵ *Water Industry Act 1991 Section 13(1) Modification of the Conditions of Appointment of United Utilities* *Water Plc* (2005) <http://www.ofwat.gov.uk/industrystructure/licences/amendments/lic_lmd_nwt_sec13081208.pdf> accessed February 4th, 2010 Condition F 1.1; see also 6A.5b; 6A.5(c)(1)

⁸⁹⁶ FoI Act 2000 (England)

⁸⁹⁷ Environmental Information Regulation 2004, SI 2004/3391

⁸⁹⁸ Birkinshaw, P., *Freedom of information* (Cambridge university press 2010) p.118

Right to Know” which contained a very narrow exemption clause and the use of the ‘substantial harm’ test.⁸⁹⁹ In 1998, another Bill was introduced and made it to the second reading in 1999, followed by a publication of the Government’s Draft in 1999. There was discontent surrounding the publication of the Bill as it contained wide exemption clauses and departed significantly from the earlier “Your Right to Know” white paper.⁹⁰⁰ On November 30, 2000, the FoI Act received royal assent and came into force in 2005.

The EIR had been in force since 1992⁹⁰¹, as a result of the Council Directive 90/313/EEC.⁹⁰² However, the Aarhus Convention⁹⁰³ was signed in 1998 to which the UK (and EC member countries) were signatories. The EC later repealed Directive 90/313/EEC and replaced it with Directive 2003/4/EC⁹⁰⁴, the content of which is adjusted to the Aarhus Convention.⁹⁰⁵ As a result, the UK had to transpose this new provision into its internal law. The government repealed the 1992 Environmental

⁸⁹⁹ The idea was said to be so radical that the Minister who introduced the white paper was sacked in a reshuffle. See *ibid* p. 119 also *Your right to know : the government's proposals for a Freedom of Information Act* (Stationery Office 1997)

⁹⁰⁰ Birkinshaw, *Freedom of information* pp.119-120

⁹⁰¹ Environmental Information Regulations 1992, SI 1992/3240

⁹⁰² Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, OJ L 158, 23.6.1990, p. 56–58

⁹⁰³ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 25 June 1998 (Aarhus Convention) 38 International Legal Materials (ILM) (1999) 515

⁹⁰⁴ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE, O.J. L 041 , 14/02/2003 P. 0026 - 0032

⁹⁰⁵ *Ibid* See para 5 of its preamble: “Provisions of Community law must be consistent with that Convention [the Aarhus Convention] with a view to its conclusion by the European Community” and para 6: “It is appropriate in the interest of increased transparency to replace Directive 90/313/EEC rather than to amend it, so as to provide interested parties with a single, clear and coherent legislative text”

Information Regulation and the EIR (2004) is in force.⁹⁰⁶ Transposition of the EIR resulted in a dichotomy on the treatment of information by public authorities. The FoI Act 2000 lists ‘Environmental Information’ as exempt information.⁹⁰⁷ As such, the EIR, and not the FoI Act 2000, is more suitable to be used to request Environmental Information held by English Public Authorities. What differentiates ‘Environmental’ from non-environmental information has been elaborated in several ECJ cases.⁹⁰⁸ EIR Regulation 2(1) (a)-(f) is considered an interpretation of what constitutes ‘environmental information’.⁹⁰⁹

In addition to the subject matter, the EIR is different from the FoI Act 2000 in many other respects. In terms of applicability, the EIR is said to be more far-reaching than the FoI, as it allegedly covers “privatised” water companies⁹¹⁰ although, as we will discuss below, this is not necessarily true. In terms of exemption clauses, the FoI Act 2000 is indeed broader than the EIR. The EIR also does not recognise ‘absolute’ exemptions as all are subject to a public interest test, whereas, the FoI Act 2000 recognises ‘absolute’ (where no public interest test is employed) and ‘relative’ exemptions.

⁹⁰⁶ EIR 2004 (England)

⁹⁰⁷ FoI Act 2000 (England) s. 39

⁹⁰⁸ See C-321/96 Wilhelm Mecklenburg v Kris Pinneberg [1998] ECR I-3809 ; C-316/01 Eva Glawischig v Bundesminister für soziale Sicherheit und Generationen [2001] ECR I-05995

⁹⁰⁹ United Kingdom Department of Food and Rural Affairs (Defra), *Environmental Information Regulations: Guidance on the boundaries between environmental and other information* (2009) <<http://archive.defra.gov.uk/corporate/policy/opengov/eir/guidance/pdf/boundaries.pdf>> p.5

⁹¹⁰ According to the DWI’s website: “Water Companies are themselves obliged to comply with the *Environmental Information Regulations*.” ‘Access to Information’ (*Drinking Water Inspectorate*, 2010) <<http://dwi.defra.gov.uk/about/access-to-info/index.htm>> accessed June 13, 2011

5.5.1. Applicability of FoI Act and the EIR to institutions involved in water services

5.5.1.1. Applicability of FoI Act and EIR to regulatory bodies

In England and Wales, entities can be covered⁹¹¹ by the FoI based on (i) the list of public authorities under Schedule 1 of the FoI Act 2000 or (ii) further designation by the Secretary of State (s.5 designation).⁹¹²

Schedule 1 of the Act specifies some of the public bodies which are covered by the Act⁹¹³ but others are covered through more general terms. For example, the Schedule covers “*Any government department*”⁹¹⁴ and this is meant to include both ministerial departments (such as DEFRA) and non-ministerial government departments, such as OFWAT and the EA. The Drinking Water Inspectorate would also fall under this definition, as part of DEFRA, although it has a distinct organisational structure and some degree of independence accorded to it by sectoral water regulations (see Section 5.2.1.6). The Consumer Council for Water, which is an executive non-departmental public body is specifically named by Part VI of Schedule 1.⁹¹⁵

The EIR is (or was intended to be) much broader compared to FoI Act 2000 in terms of its coverage. The EIR covers (i) government departments,⁹¹⁶ (ii) public

⁹¹¹ FoI Act 2000 (England), s.3 on the definition of “Public Authorities”

⁹¹² Ibid , s.5

⁹¹³ See Schedule 1, *ibid* , Part VI: Other Public Bodies and Offices: General.

⁹¹⁴ Schedule 1, para 1, *ibid*

⁹¹⁵ Ibid, Part VI: Other Public Bodies and Offices:General

⁹¹⁶ EIR 2004 (England), Regulation 2 (2) (a)

bodies listed in schedule 1 of the FoI Act 2000 (but with some exceptions),⁹¹⁷ (iii) any other body that carries out functions of “public administration”⁹¹⁸, (iv) any other body or person under the control of the previous categories which has public responsibilities relating to the environment, or exercising functions of a public nature relating to the environment or provides public services relating to the environment.⁹¹⁹ If an entity is not covered under the first category, it may be covered under the other categories. The third and fourth category have been the subject of controversy for water utilities.

⁹¹⁷ Ibid, Regulation 2 (2) (b). The special forces and any other special units are included (they are excluded under FoI Act 2000 (England)), insofar as it concerns environmental information.

⁹¹⁸ EIR 2004 (England), Regulation 2 (2) (c)

⁹¹⁹ Ibid, Regulation 2 (2) (d)

Table 6: Application of FoI/EIR to Water Regulators

Institution	Function	Legal Basis of Applicability
OFWAT	Regulation of the water industry in general: price setting, consumer protection, competition	FoI Act 2000 s, 3(1)(a)(i), Schedule 1, para 1; EIR Reg 2(2) a
Environment Agency	Pollution control, management and conservation of water resources, issuance of abstraction licence and discharge permits	FoI Act 2000 s, 3(1)(a)(i), Schedule 1, part VI; EIR Reg 2(2) b
Drinking Water Inspectorate (acts on behalf of DEFRA)	Water quality regulator, technical audit on water companies, investigating consumer complaints and water quality incidents	FoI Act 2000 s, 3(1)(a)(i), Schedule 1, para 1; EIR Reg 2(2) a
Consumer Council for Water	Representing consumers' interests, taking complaints, investigating water industry on consumer complaints	FoI Act 2000 s, 3(1)(a)(i), Schedule 1, part VI; EIR Reg 2(2) b
Competition Commission	Accepting referrals on merger issues, adjudicating breaches of competition law concurrently with OFWAT	FoI Act 2000 s, 3(1)(a)(i), Schedule 1, part VI ; EIR Reg 2(2) b
Department of Environment, Food and Rural Affairs	Standard setting, drafting of legislations and policies, appointment of regulators, industry restructuring	FoI Act 2000 s, 3(1)(a)(i), Schedule 1, para 1; EIR Reg 2(2) a

The application of the UK FoI Act and EIR to the institutions above appears to be straightforward. All of them adopt model publication schemes as required by the FoI Act (s.19).

5.5.1.2. Applicability of the FoI Act and EIR to private water companies

Insofar as water utilities are concerned, controversies prevail. In the heyday of private sector participation (PSP) in public services, literature on the diminishing values of public law emerged. Earlier critics such as Minow argued that “*Access to information about services and results also decreases if the information becomes private*”.⁹²⁰ Meanwhile, Swyngedouw argued that water privatisation dispossesses the public from data and information that is normally available⁹²¹ (See Section 2.1 Literature Review).

Realising that the focal point of power had shifted from the state to corporations, champions of access to information law such as Calland advocated the idea that corporations which are playing a quasi-public role should also be covered by access to information laws.⁹²² Privatised water utilities, due to their natural monopoly

⁹²⁰ Minow, ‘Public and private partnerships: accounting for the new religion’

⁹²¹ “...*the privatized nature of crucial parts of the water cycle diminishes the transparency of decision-making procedures and limits access to data and information that could permit other social groups to acquire the relevant information on which to base views, decisions, and options*” Swyngedouw, ‘Dispossessing H₂O: the contested terrain of water privatization’

⁹²² Calland, R., ‘Transparency in a Profit Making World’ (*Institute for Policy Dialogue*, 2006) <http://www0.gsb.columbia.edu/ipd/pub/Calland_Private_Sector.pdf> accessed February 29, 2010

and the essentiality of their product, are considered by him to be corporations of this kind and should, therefore, be covered by access laws.⁹²³

This idea – to expand the coverage of FoI to privatised utilities –too, had been around in the UK and had regained public attention when the Secretary of State proposed to include other bodies to be covered by the FoI through its s.5⁹²⁴ designation.⁹²⁵ In addition to the view that utilities including water are essential services, it was generally perceived by the respondents on the s.5 designation consultation that there is a public interest in obtaining information on the decisions made by those companies regarding how their services are delivered.⁹²⁶ The UK government considered that information about utilities are already available through regulatory bodies, which are subject to the FoI Act 2000. Thus, they considered that the current access rights were already adequate, without an urgent need to directly cover water utilities under the FoI act. Eventually, the UK Government abandoned the idea of including the utilities under the initial s.5 designation, although they plan to commence another consultation in order to include some or all of the utilities under

⁹²³ Ibid

⁹²⁴ FoI Act 2000 (England) s.5

⁹²⁵ United Kingdom, *Freedom of Information Act 2000: Designation of additional public authorities, Consultation Paper CP 27/07* (2007) <<http://www.justice.gov.uk/consultations/docs/cp2707.pdf>> June 23, 2011

⁹²⁶ United Kingdom, *Freedom of Information Act 2000: Designation of additional public authorities, Response to Consultation CP(R) 27/07, 16 July 2009* (2009) <http://www.justice.gov.uk/consultations/docs/consultation-response-_section5.pdf> June 23, 2011 p.10

subsequent s.5 orders or to amend the FoI Act 2000 in some way so as to incorporate privatised utilities.⁹²⁷

There is a stronger argument for including water utilities under the FoI Act's coverage: the move towards risk based regulation. The UK Government's argument that access to regulatory information is adequate is only relevant to the present day situation where OFWAT has wide powers in acquiring detailed information from utilities and does so, and subsequently publishes this.⁹²⁸ However, OFWAT is planning to move to a risk-based regulation and will no longer require utilities to submit their annual June Return. This will result in the significant decrease of regulatory information published by OFWAT. As discussed in the previous sections, OFWAT's plan is to have utilities publish their own regulatory account. Thus, the focal point for transparency in British water utilities regulation will slowly move from OFWAT to the regulated company. As the UK Government's justifications for exempting utilities from the FoI Act will no longer be relevant in the near future, it is only appropriate that water utilities are included as a "Public Body" in the next s.5 designation or through an FoI Act amendment. Failure to include water utilities under FoI coverage will result in the disconnection between "active" and "passive" disclosure policies. OFWAT will subject utilities to some active disclosure policies by obligating them to publish their regulatory account (and presumably other regulatory information). However, if the FoI Act is not applicable to them, there is no way that

⁹²⁷ United Kingdom, *Freedom of Information Act 2000: Designation of additional public authorities, Consultation Paper CP 27/07* p.10

⁹²⁸ See Section 5.3.4 "Means of Acquiring Information" and Section 5.3.5 "OFWAT's General Disclosure Policy" above

the public would be able to verify detailed background information which underlies the companies' reports.

An important benefit from subjecting water utilities to FoI is the opportunity to dig out “residual” information. There are two classes of information in the regulatory process; on the one hand, information which is submitted to or is requested by the regulator in the course of the regulation (such as the June Return and other reports) and, on the other hand, information which utilities keep for themselves either because the regulator failed to detect it or because it is not required by law to be reported to the regulators. The benefit of subjecting utilities to the FoI Act will come from the ability to access this type of residual information. Nevertheless, only stakeholders with sufficient knowledge and resources will be able to dig out information which regulators have failed to discover or not sufficiently recovered by sectoral law. Industrial stakeholders, downstream market participants or sophisticated consumer organisations would be among the typical stakeholders that would expend time and resources in finding such information. This is evident from several FoI cases discussed below.

Birkinshaw notes that utilities may want to reject the effort of extending FoI for reasons of “*unjustified state intervention, damage to profitability, undermining competitive capability, and producing an uneven playing field especially in relation to overseas competitors*”.⁹²⁹ He continued: “*In the absence of EU-wide initiatives those*

⁹²⁹ Birkinshaw, P., ‘Freedom of information and its impact in the United Kingdom’ 27 Government Information Quarterly 312

*within the business sector would maintain: why should the UK business sector be hampered by legal requirements affecting only British industry?”*⁹³⁰

Unlike other utilities, however, many of the world's and indeed the EU's water utilities are state-owned and, therefore, could fall under FoI or similar access to environmental information laws given the application of the Aarhus Convention and Directive 2003/4/EC.⁹³¹ Even within the UK there is Scottish Water, which is state-owned, and is covered by the Freedom of Information (Scotland) Act.⁹³² Scottish Water – despite its FoI coverage – performs quite well if compared to its English counterparts, which are not covered by FoI or EIR and charges customers even less than the majority of English water utilities.⁹³³

The above evidence provides indications that imposing access to information laws on water utilities does not appear to hinder their ability to deliver quality services to customers. It may well be that imposing FoI on water utilities could jeopardise their overseas competitiveness, but this is primarily a concern for the utilities' ultimate shareholders and not the local community which it services. Moreover, FoI also

⁹³⁰ Ibid

⁹³¹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE, O.J. L 041 , 14/02/2003 P. 0026 - 0032

⁹³² Freedom of Information (Scotland) Act 2002, 2002 asp 13

⁹³³ *Performance Report 2010* (Water Industry Commission for Scotland, 2010) <<http://www.watercommission.co.uk/UserFiles/Documents/WICSPerformanceReport2010.pdf>> June 22, 2011 Scottish Water is benchmarked against other English and Wales water utilities. Its Overall Performance Assessment (OPA) score for 2010 fits well with the average English water utilities' OPA. In terms of average household bills, Scottish water is among the lowest if compared to England and Wales water companies, with seven English companies charging higher than Scottish Water. *Costs and performance 2008–09* (Water Industry Commission for Scotland, 2009) <<http://www.watercommission.co.uk/UserFiles/Documents/WICS%20CostsPerformance%20final.pdf>> June 22, 2011

provides safeguards in the form of exemption clauses (see the next section below), so it does not necessarily mean that once exposed to FoI, all information from water companies will can be disclosed.

For EIR, its application or disapplication to water utilities is not straightforward. Similar to the FoI Act, whether water utilities should be covered is a contentious issue. However, because EIR relies on definition in determining the status of a public body, the issue is much more controversial than the FoI and has triggered several cases. “Public Authority” is defined by EIR, Regulation 2 (2) as:⁹³⁴

government departments;

any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—

(i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or (ii) any person designated by Order under section 5 of the Act;

any other body or other person, that carries out functions of public administration; or

any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—(i) has public responsibilities relating to the environment; (ii) exercises functions of a public nature relating

⁹³⁴ EIR 2004 (England)

to the environment; or

(iii) provides public services relating to the environment.

Initially, it was thought by some authors that EIR would, without much controversy, be automatically applicable to water utilities.⁹³⁵ DEFRA guidance on EIR – reiterating the Aarhus Implementation Guideline – specifically mentions that private companies may fall under EIR 2(2) (c) or (d), and the guideline also provides private entities conducting “water management functions” or waste collection companies under contract with local governments as examples.⁹³⁶ The DEFRA guidance added a caveat though, that either the elements of “public administration” or “under the control” accompanied by any of the sub paragraphs (i), (ii) or (iii) of the above Regulation 2(2) has to be fulfilled. Interestingly, it adds that “under the control” could mean “*a relationship constituted by statute, **regulations**, rights, licence, contracts or other means which either separately or jointly confer the possibility of directly or indirectly exercising a **decisive influence** on a body. Control may relate,*

⁹³⁵ See DWI’s website: “*Water Companies are themselves obliged to comply with the Environmental Information Regulations.*”, ‘Access to Information’; Also Davis (2006): “*The critical point for water companies is that, because they provide a service relating to the state of the environment within a statutory regulatory and licensing regime, they too are classed as public authorities for the purposes of the regulations and are subject to the obligations to disclose, on request, environmental information which they hold. This includes, for instance, their own cost-benefit analyses in relation to environmental protection measures.*” Davis, R.W., ‘The Environmental Information Regulations 2004: Limiting Exceptions, Widening Definitions and Increasing Access to Information?’ 8 Environmental Law Review 51 and Al’Afghani, M.M., ‘The transparency agenda in water utilities regulation and the role of freedom of information: England and Jakarta case studies’ 20 Journal of Water Law 129

⁹³⁶ *Environmental Information Regulations 2004 detailed guidance* (Defra 2005) <<http://archive.defra.gov.uk/corporate/policy/opengov/eir/guidance/full-guidance/>> January 5, 2010

not only to the body, but also to control of the services provided by the body” (Emphasis and Italics added).⁹³⁷

These predictions, that the EIR will likely cover water utilities, had been partially strengthened by earlier analysis of the UK Information Commissioner (IC) in *Sutton and East Surrey Water Plc* (2008).⁹³⁸ The consideration on the case was that, since water companies are appointed by the Secretary of State (or indirectly by the Director General of Water Services), and can have their licence terminated, they are deemed to have been ‘appointed to administer the public water supply on behalf of the government’, and therefore fall within the definition of “*carrying out the functions of public administration*” under EIR Regulation 2(2)(c).⁹³⁹ Secondly, the IC also deemed that they can also be categorised as entities which, “*under the control*” of other public bodies, have public responsibilities relating to the environment⁹⁴⁰ (EIR Regulation 2(2)(d)). OFWAT, according to the IC, is the other public body ‘controlling’ Sutton and East Surrey plc through specific duties to protect the environment under the Water Industry Act 1991.

In 2010, however, the IC changed their position. This move was confirmed by the Upper Tribunal. The leading cases are *Fish Legal vs Yorkshire Water Services and United Utilities* (alleged Public Authorities), and *Smartsource Drainage & Water Reports Limited*.⁹⁴¹ *Smartsource Drainage & Water Reports Limited*,⁹⁴² a company

⁹³⁷ Ibid Guidance 2.19

⁹³⁸ FER0118853 (*Sutton and East Surrey Water Plc*) Information Commissioner's Office

⁹³⁹ Ibid para 20

⁹⁴⁰ Ibid para 20

⁹⁴¹ Respectively, FER0269130 and FER0272665. The original decisions are not available in the Information Commissioner's Website. The ‘Decision Notice’ was sent to the applicant, Fish Legal, in

which provides services for water efficiency savings for customers,⁹⁴³ lodged an FoI request to 16 water utilities. The utilities granted the disclosure of some information but denied the others.⁹⁴⁴ The case was brought to the IC which decided that it has no jurisdiction⁹⁴⁵, and was later brought to the Upper Tribunal. The crux of the dispute is that the phrases “**functions of public administration**” and “**under the control**” of EIR Regulation 2(2)(c) and (d) respectively, are deemed not applicable to water utilities.

“Functions of Public Administration”

the form of a letter. Presumably, this is because the IC considered that there had been no case. *Case Reference Numbers FER0269130 & FER0272665 (Yorkshire Water Services and United Utilities)*, ICO Decision March 12, 2010 Information Commission The author has the copy.

⁹⁴² *Smartsource Drainage & Water Reports Limited v The Information Commissioner, Upper Tribunal Case No. GI/2458/2010* The Upper Tribunal (Administrative Appeals Chamber)

⁹⁴³ If Smartsource can spot any saving, it will then inform consumers about ways to save their water bills, including recommending the installation of water meter or efficiency devices. It will then arrange with water utilities to make changes. Smartsource takes commission in the amount of 50% of the consumer’s savings. Smartsource, ‘Frequently Asked Questions’ (*SmartSource Drainage & Water Reports Limited*) <<http://www.smartsourcewater.co.uk/faq>> accessed June 27, 2011

⁹⁴⁴ The information requested to water and sewerage companies was: (1) asset mapping database; (2) water and sewerage billing records; (3) a list of all properties subject to “building over agreements”; (4) sewer flooding register; (5) water pressure register; (6) water quality reports; and (7) trade effluent register. Item (6) and (7) were disclosed, as there was a statutory basis under Part VIII of the Water Supply (Water Quality) Regulations 2000 (SI 2000/3184) and section 196 of the Water Industry Act 1991, but the rest were denied as they do not consider themselves public authorities under EIR. *Smartsource Drainage & Water Reports Limited v The Information Commissioner, Upper Tribunal Case No. GI/2458/2010* paras 7-8

⁹⁴⁵ In its 12 March 2010 letter, the IC considered that it has no jurisdiction over the case. The ‘Decision’ is not available on the ICO website and the author does not have its copy. Apparently, the IC sent a letter to the complainant instead of serving the copy of the formal decision notice. This was considered by the Upper Tribunal, which concludes that the letter is considered sufficient to be regarded as a Decision: “*The fact that the Commissioner’s decision was set out by way of a letter, rather than in the official decision notice format, cannot be decisive. The letter ran to seven pages of detailed legal analysis, referring to both the legislation and relevant case law. We must have regard to the substance and not to the form.*” See *ibid* para.14 The letter sent to Fish Legal (a copy is with the author) was also dated March 12, 2010 and ran sevenpages of legal analysis, as quoted above.

The phrase is found in EIR Regulation 2(2)(c) and the corresponding Directive 2003/4/EC Article 2(2) b⁹⁴⁶ which reiterates verbatim the Aarhus Convention Article 2(2) (b).⁹⁴⁷

One of the arguments forwarded for water utilities as performing “functions of public administration” are the facts that: (i) they provide water and/or sewerage service, (ii) they carry out certain regulatory and enforcement functions in the management and operation of the infrastructure and in the management of water resources, and (iii) in doing so, they are not only servicing customers but also managing the environment. Water utilities are also (a) appointed statutory undertakers subject to licence conditions, (b) subject to comprehensive and detailed regulation, (c) compelled with a duty to provide universal service (which entails that they cannot choose customers, determine own prices or refuse to deal) and (d) in the event of failure, subject to government action to ensure continuity. To the appellant, these factors accounted altogether should mean that water utilities are performing ‘functions of public administration’ and are therefore a Public Authority under EIR.⁹⁴⁸

Unfortunately, the Upper Tribunal rejected this argument. In their view, although water utilities are appointed statutory undertakers subject to licence, they are not created by statute but incorporated under the Companies Act, which makes them fundamentally a private company “*independent of government, in the business of*

⁹⁴⁶ “any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment”

⁹⁴⁷ “any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment”

⁹⁴⁸ See *Smartsources Drainage & Water Reports Limited v The Information Commissioner*, Upper Tribunal Case No. GI/2458/2010 para 36, summarising the Appellant’s submission

supplying water and sewerage services to the public for profit".⁹⁴⁹ With respect to the obligation of universal service, which entails that water utilities cannot pick and choose their customers, the Upper Tribunal responded that "*there are other providers of services licensed under statute who lack the ability to pick and choose their customers (e.g. black cab drivers in London)*".⁹⁵⁰ The safeguarding of continuity and supply through a special administrative order by the High Court if companies are failing, was not regarded as the carrying out of public functions, "*as the provisions in question do not envisage the State stepping in as a provider of last resort*", but merely to transfer the failing enterprise to another private sector provider.⁹⁵¹ The Upper Tribunal rejected the proposition that water companies' powers, for example, in imposing hosepipe bans, refusing to consent to trade effluent or their power to make by-laws, are indications of "functions of public administration". These provisions are only ancillary to their primary purpose, which is commercial and is considered to be there merely to protect their assets. The core regulatory functions of "public administration", resides with OFWAT and the Secretary of State.⁹⁵² This "*ancillary*" theory was later confirmed by the First Tier Tribunal on *The Duchy of Cornwall*.⁹⁵³ According to the tribunal, if the functions of public administration carried within the

⁹⁴⁹ Ibid para 70

⁹⁵⁰ Ibid para 73

⁹⁵¹ Ibid para 74

⁹⁵² Interestingly, when referred to the EC's Water Framework Directive which reads: "*Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such*" the Upper Tribunal choose to understand it not as "water is not a commercial product" but as "water is a commercial product, but a different one". According to the Upper Tribunal, "*In other words, it is both part of the heritage of our natural environment and a special commercial product.*" Ibid para 77

⁹⁵³ *Bruton v IC and The Duchy of Cornwall & The Attorney General to HRH the Prince of Wales* (EA/2010/0182)

body is “*on the whole a secondary function which are related to and flow from the primary functions which are not functions of public administration*” (i.e. commercial), then the body is not a public authority under EIR.⁹⁵⁴

The Upper Tribunal also compared water utilities to Network Rail⁹⁵⁵ and found similarities and differences. The similarities are that they are both major utilities, operating under a licence, have some degree of commercial independence, subject to price regulation and do not enforce or set health and safety standards. The differences are that water utilities are accountable through their AGM, they receive no public funding (whereas Network Rail receives 70% government funding) and finally, they do not have government nominees on their board of directors.⁹⁵⁶ Because of this, the Upper Tribunal decided that water utilities have fewer characteristics of a public authority than Network Rail.⁹⁵⁷

The Aarhus Guide actually provides indications that privatised water utilities could be exercising public administrative functions. Interpretation of ‘public administrative functions’ under Article 2 (2) (b) of the Aarhus Convention covers “*Public corporations established by legislation or legal acts of a public authority under [the previous paragraph]*”. It continues: “*The kinds of bodies that might be covered by this subparagraph include public utilities and quasi-governmental bodies*

⁹⁵⁴ Ibid para 63

⁹⁵⁵ Incorporating previous case decided by the Information Tribunal *Network Rail Limited and the Information Commissioner* (EA/2006/0061 and EA/2006/0062) Information Tribunal

⁹⁵⁶ *Smartsources Drainage & Water Reports Limited v The Information Commissioner*, Upper Tribunal Case No. GI/2458/2010 paras 66-67

⁹⁵⁷ Ibid para 68 they also remark that some water companies are foreign-owned and can buy each other, subject to competition legislation. This is another factor which leads them to decide that they are less of public authorities compared to Network Rail

such as water authorities”. Unfortunately, the Upper Tribunal considered that referrals to utility companies in the Aarhus Guide are equivocal and only demonstrate that such assessments are fact and jurisdiction specific.⁹⁵⁸ With all of those considerations above, it decided that water utilities are not carrying out “functions of public administration”.⁹⁵⁹

“Under the control of”

The focus of the debate is whether the regulator and the government’s treatment to water utilities can be categorised as a “control” under EIR regulation 2(2)(d). According to the respondents, “control” should mean that the entity must be effectively a part of the government or the executive machinery.⁹⁶⁰ Taking the examples of pharmaceuticals for price control and pubs for licensing, they dismissed the idea that price control or licensing are enough to establish “control” under EIR Regulation 2 (2) (d). They added that “control” should mean that the controlling body is in the position to dictate both means and the outcome of the process, whereas the WIA 1991 only set the objectives, but not the means, to achieve it.⁹⁶¹

⁹⁵⁸ Ibid paras 39-40

⁹⁵⁹ Ibid para 78

⁹⁶⁰ Ibid para 81

⁹⁶¹ This is certainly not the case when water utilities are restructured. In some cases, OFWAT does impose some governance requirement such as bond listing in the capital market in order to subject them to corporate governance and disclosure rules or, alternatively, to require them to subject themselves to capital market disclosure rules as if their equities are listed there. See Section 5.4.3 on “Corporate restructuring”. This means that OFWAT not only determines the outcome, but somewhat also dictates the means for achieving them.

This view is similar to an earlier view of the IC in *Fish Legal (Complainant) vs Yorkshire Water Services and United Utilities* (alleged Public Authorities).⁹⁶² In this case, the IC considered that close regulation by OFWAT, DWI and EA does not constitute “control” under EIR 2(2)(d) as regulation is described as a “supervisory framework” within which the utilities are given a degree of independence to deliver the service and that intervention will be carried out only when the utilities is or will likely to be in breach of its licence condition or relevant legislations.⁹⁶³ For the IC, control must amount to enabling the regulator to exert a “decisive influence”⁹⁶⁴ on the utilities. The fact that the utilities are free to undertake their own financing, borrowing and making investment decision is analogous to other UK companies which are subject to regulatory constraint from, for example, Companies House.⁹⁶⁵ The IC also commented on the utilities’ corporate governance in order to justify its arguments. It argued that, save some provisions relating to the appointment of non-executive directors, regulators or other public bodies have no right to appoint or veto the appointment of a director, and, therefore, there is no suggestion that public authorities may exert a controlling influence on a water company through board representation. Hence, according to the IC’s interpretation, the meaning of a “control” has to be

⁹⁶² Respectively, FER0269130 and FER0272665. The original decisions are not available on the Information Commissioner’s Website. The ‘Decision Notice’ was sent to the applicant, Fish Legal, in the form of a letter. Presumably, this is because the IC considered that there had been no case. *Case Reference Numbers FER0269130 & FER0272665 (Yorkshire Water Services and United Utilities)*, ICO Decision March 12, 2010 The author has the copy.

⁹⁶³ Ibid

⁹⁶⁴ This is taken from the DEFRA Guidance (see above) , *Environmental Information Regulations 2004 detailed guidance*

⁹⁶⁵ *Case Reference Numbers FER0269130 & FER0272665 (Yorkshire Water Services and United Utilities)*, ICO Decision March 12, 2010

narrowly constructed to signify influence towards the utility company's day to day decision making, such as in financing and investment, or board appointments.

Again, the Aarhus Guide provides a lengthy discussion, which was quoted by the Upper Tribunal:

*“An example from the United Kingdom may help to illustrate the relevance of this provision. There, public functions previously carried out by governmental authorities had been taken over through a privatisation process by public corporations. These included major providers of natural gas, electricity, and **sewerage and water services**. In the case of the water providers, they were highly regulated by the Government and kept financial accounting for these services separate from their other activities. In a court case in the United Kingdom about the applicability of European Community directives to such a **water services company, the judge determined that such a service provider was an ‘emanation of the State’ and therefore covered by the directive.**”⁹⁶⁶ (Emphasis added).*

The case referred to by the Aarhus Guide above would be *Griffin*.⁹⁶⁷ It would appear from the Guide that the intention of the Aarhus Convention is to cover all privatised public utilities, and this too appears from another passage:

“The definition [of a Public Authority under Aarhus Convention] is broken into three parts to provide as broad a coverage as possible. Recent developments in “privatized” solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such

⁹⁶⁶ Aarhus Guide p.33

⁹⁶⁷ *Griffin v South West Water Services Limited* [1995] IRLR 15 High Court; *Smartsource Drainage & Water Reports Limited v The Information Commissioner*, Upper Tribunal Case No. GI/2458/2010 para 84.

*innovations cannot take public services or activities out of the realm of public involvement, information and participation.”*⁹⁶⁸

However, attempts to cover water utilities as a Public Authority under Aarhus tend to fail, because the paragraph above is closed with this one: *“Implementation of the Convention would be improved if Parties clarified which entities are covered by this subparagraph. This could be done through categories or lists made available to the public”*.⁹⁶⁹ Those paragraphs above had been stamped by the Upper Tribunal as equivocal and that the last sentence was “restating the question”, rather than answering them.⁹⁷⁰ This was an unfortunate judgment since the Aarhus Guide through the above paragraphs is quite clear in exemplifying that the Convention intended to deal with access to information to privatised public services

The DEFRA guidance, although it reiterates the Aarhus Guide in many of its passages, tends to put emphasis more on the context and case by case analysis of the situation. It suggests, for example, that the existence of a contract between a government body and a private company may or may not bring the company under EIR⁹⁷¹. The DEFRA Guide, citing *Griffin*, explains that *“Public utilities, for example, are involved in the supply of essential public services such as water, sewerage, electricity and gas and may fall within the scope of the EIRs”* but added that significant legislative changes and development of the electricity and gas industry since *Foster* was decided (and referred to in *Griffin*) would probably have led to a

⁹⁶⁸ Aarhus Guide p.32

⁹⁶⁹ Aarhus Guide p. 33, see also *Smartsources Drainage & Water Reports Limited v The Information Commissioner*, Upper Tribunal Case No. GI/2458/2010 para 107

⁹⁷⁰ Ibid para 84

⁹⁷¹ , *Environmental Information Regulations 2004 detailed guidance* Chapter 2, para 2.20

different outcome if it was decided at the present time.⁹⁷² Presumably, the DEFRA guidance was referring to the unbundling and in-the-market-competition of the British electricity and gas sector and maintains that such restructuring may fundamentally alter the definition of the incumbent company as a public authority.

Although *Griffin* had incorporated part ii of the *Foster*⁹⁷³ test (which is “under the control of the state”) and had accepted that water utilities are covered by this test, the Upper Tribunal choose not to rely too much on it. This is because *Griffin*’s preliminary analysis was that the question is not whether the body is “under control” of the state but whether the “public service” is, and that the legal form, the commercial concern, the consideration as to whether the State has day-to-day control of the utilities or whether the body is a state agent were all considered irrelevant. For the Upper Tribunal, *Griffin* was asking a different question and that its context – safeguarding worker’s rights when later employed by non-governmental bodies – is different from the case at hand.

The Upper Tribunal elaborated that the purpose of the Aarhus Convention is to capture the government and the executive functions in various guises.⁹⁷⁴ Privatised water utilities are not within this category and are treated at arm’s length from the state’s machinery. For the Upper Tribunal, regulation is about “*formulating policy and strategy, determining outcomes, setting standards, making and enforcing rules and*

⁹⁷² *ibid* Chapter 2, para 2.22

⁹⁷³ *Case C-188/89. A. Foster and others v British Gas plc*. European Court reports 1990 Page I-03313 European Court of Justice

⁹⁷⁴ The tribunal refers to para 30 of the Aarhus Guide, explaining ranges of governmental activities

*issuing guidance*⁹⁷⁵ whereas ‘control’ must go beyond that, so as to imply command and compulsion, and making decisive influence on the companies’ policies, not only by designating the ends, but also with the means to achieve them.

5.5.2. Exemption clauses

One of the striking differences between active and passive disclosure rules is that, because the latter establishes a right of access to information in *general*, there would be a need to qualify such generalities by making exceptions. On the other hand, this does not usually occur in active disclosure rules.

In the UK FoI Act, there are two categories of exemptions: absolute and qualified. For absolute exemptions,⁹⁷⁶ a balancing test is not mandatory, whereas for relative exemptions, it is applied. There are two kinds of balancing test under the UK FoI Act: the balancing test which contains both a ‘harm’ test and ‘public interest’ test and those which contain only a ‘public interest’ test.

The UK FoI Act contains a number of exemption clauses, which are quite broad, but only four are considered most relevant⁹⁷⁷ to water utilities’ regulation.

⁹⁷⁵ *Smartsource Drainage & Water Reports Limited v The Information Commissioner, Upper Tribunal Case No. GI/2458/2010* para 95

⁹⁷⁶ S.2 of the English FoI Act regulates that exemptions under sections 21, 23, 32, 34, 36 (insofar as it relates to information held by the House of Commons or the House of Lords), 40 (in some cases), 41 and 44 are absolute, which means that no public interest tests are employed. English FoI Act

⁹⁷⁷ Fitch and Graham considered four exemptions in the FoI Bill which they consider to be most relevant for utilities regulation: decision-making and policy formulation, information relating to enforcement action, information obtained in confidence and information of a commercial nature. See Fitch, M. and C. Graham (1999). "The draft Freedom of Information Bill—implications for utilities." *Utilities Law Review* **10**(6): 257-261.

these are information relating to enforcement action; information provided in confidence; commercial information; and decision making and policy formulation.

5.5.2.1. Law enforcement

The analytical framework (chapter 2) discussed the importance of transparency with respect to violation, by the utilities, of service levels or other regulatory arrangements, and any investigation or penalty made by the regulator in response to such violation. As explained in section 4.3.7 **“Error! Reference source not found.”** above, OFWAT had been quite transparent in its practice of investigation and enforcement, by announcing the steps it made against water utilities’ non-compliance and the rationale of its enforcement actions.

However, there have been instances where a regulator might be perceived as delaying investigation, or when it eventually takes place, not properly using its authority to penalise the utilities. This was the conclusion made by the Public Accounts Committee of the House of Commons when OFWAT was perceived to have failed to immediately take action against Thames Water’s leakage target.⁹⁷⁸

While OFWAT or other regulators may be announcing their enforcement actions on their website, a transparency regime could be beneficial to understanding the details behind such enforcement, or alternatively, the rationale on why

⁹⁷⁸ “Since 2000 Thames Water has persistently missed its leakage targets, but OFWAT took no enforcement action until 2005–06, and even then did not apply its new powers to impose financial penalties. OFWAT should take enforcement action against companies who do not meet their targets by applying the maximum financial penalties, and it should clarify its legal position should it wish to use a stronger sanction such as revoking a company’s licence.” Ofwat, Ofwat: Meeting the demand for water, Twenty-fourth Report of Session 2006–07 p.6

enforcement appears to be inadequate. Exemption clauses in the FoI Act 2000 and EIR, however, may restrict this from occurring by providing exemptions for law enforcement and investigation.⁹⁷⁹ We shall deal with the FoI Act 2000 exemption first, and then the EIR.

FoI Act 2000

Section 30 and 31 exempt investigation and law enforcement in general. The former relates to specific investigatory or prosecutorial functions of a public authority and the latter does not relate to that function but applies simply when certain information is held. Section 31 is therefore broader than s.30.

Section 30 of the FoI Act 2000 exempts information related to investigations and proceedings conducted by a Public Authority if such information had been or is being held by a Public Authority for the purpose of investigation. As such, it also covers closed and abandoned investigations conducted by public authorities.⁹⁸⁰ The term ‘investigation’ here is quite broad, as it covers information related to questions as to whether a person should be charged with an offence, whether a person charged with an offence is guilty or if it amounts to criminal and/or civil proceedings.⁹⁸¹

⁹⁷⁹ English FoI Act, s. 30 (Investigation and proceedings) and s. 31 (law enforcement),

⁹⁸⁰ “Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of...” (Underline added) s.30 (1) FoI Act 2000 (England) The exemption for criminal investigations, criminal proceedings and confidential source (Information Commissioner Office 2009)

<http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/s30_exemption_for_investigations_and_proceedings_v3.pdf> July 1, 2011

⁹⁸¹ FoI Act 2000 (England) s. 30

OFWAT has wide investigation and enforcement powers⁹⁸². Those which relate to ‘offences’, for example, are the unauthorised use of an undertaker’s network,⁹⁸³ the supply of water unfit for human consumption,⁹⁸⁴ and water contamination.⁹⁸⁵ The term ‘charged with an offence’,⁹⁸⁶ is not defined in the Act. In practice, the ICO expanded this into anything that could lead to the commencement of criminal proceedings including police cautions.⁹⁸⁷

What about ‘regulatory offences’ or penalties, such as that which can be imposed by OFWAT through WIA s.22 A? It has been suggested that the distinction between criminal and ‘regulatory’ offence is unhelpful, and the latter *may* lead to criminal offences of one kind or another.⁹⁸⁸ Hence, it is likely that the investigation leading to a penalty decision may be covered by this exemption. This analysis may not be required however, since s.30(2)(iii),⁹⁸⁹ referring to s.31(2), lists various types of investigation including those the purpose of which is to ascertain whether any person has failed to comply with the law and those which evaluate if “*circumstances which would justify regulatory action in pursuance of any enactment exist or may arise*”.

⁹⁸² This is imposed in the licence condition, for example, see para 8-9, *Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989*

⁹⁸³ Collins, A. and Fairchild, R., ‘Sustainable food consumption at a sub-national level: an ecological footprint, nutritional and economic analysis’ 9 *Journal of Environmental Policy & Planning* 5s.661-L,

⁹⁸⁴ *Ibid* s.70

⁹⁸⁵ *Ibid* s.73

⁹⁸⁶ FoI Act 2000 (England) s.30(1)(a)

⁹⁸⁷ , *The exemption for criminal investigations, criminal proceedings and confidential source*

⁹⁸⁸ See para 3.43: Should criminal offences and regulatory offences be distinguished? United Kingdom, *Criminal liability in regulatory contexts : a consultation paper* (The Law Commission Consultation Paper No 195 2010) <http://www.justice.gov.uk/lawcommission/docs/cp195_Criminal_Liability_consultation.pdf> July 1, 2011

⁹⁸⁹ This section refers to the FoI Act 2000 (England) s.31(2)

These phrases would effectively cover investigations undertaken through all layers of enforcement action by OFWAT, including (s.19), the ‘enforcement order’ (s.18) and, financial penalties (s 22 A).⁹⁹⁰

Section 30 contains a public interest test and is a ‘class exemption’ where the harm test is not necessary, although in practice, for the purpose of constructing the public interest argument, the harm from disclosure may need to be argued. The right to fair trial is generally accepted as a public interest which needs protection from disclosure.⁹⁹¹

If information is not exempt under s.30, then it may be exempt under s.31,⁹⁹² and this section contains a harm test, which needs to be argued by the public authority. Section 31 comprises of a lengthy list, from the prevention or detection of crime, the administration of justice, when authorities need to ascertain as to whether any person has complied with law as well as any justifications for conducting regulatory action.

EIR

The EIR provides exemption for disclosure of information which “adversely affects” (i) the course of justice, (ii) the ability of a person to receive a fair trial and (iii) the ability of a public authority to conduct an inquiry of a criminal or disciplinary

⁹⁹⁰ Water Industry Act 1991 (England) 19, 18 and s22A

⁹⁹¹ , *The exemption for criminal investigations, criminal proceedings and confidential source*

⁹⁹² S.31 (1): “Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice”.

nature.⁹⁹³ A public interest test is mandatory to all exemptions made under EIR, including this one.⁹⁹⁴

The term “adversely effect” means that there should be a harm test and the threshold for non-disclosure is a high one.⁹⁹⁵ The term “course of justice” has been interpreted widely so as to include law enforcement.⁹⁹⁶ “Proper administration of the law” such as prevention, investigation or detection of crime, and apprehension or prosecution of offenders is also deemed to come within the exemption,⁹⁹⁷ as well as legal professional privilege.⁹⁹⁸

The application of this type of exemption to a water utilities regulator is likely to be similar to the FoI, the difference being the former obligates a harm test with a high threshold, whereas s.30 of the FoI Act 2000 contain no harm test and s.31 contain a harm test but with a lower threshold, compared to the EIR.

5.5.2.2. Commercial Information

FoI Act 2000

⁹⁹³ EIR 2004 (England) Regulation.12 (5) (b) This exemption applies when the public authority is not exercising its legislative or judicial function, as bodies exercising those functions are beyond the scope of EIR’s applicability See *ibid* Regulation 3 (3)

⁹⁹⁴ *Ibid* Regulation 12 (b)

⁹⁹⁵ See *Archer v The Information Commissioner and Salisbury District Council*, EA/2006/0037 Information Tribunal para 51

⁹⁹⁶ *Environmental Information Regulations 2004 detailed guidance* Guidance 7

⁹⁹⁷ *Ibid* Guidance 7

⁹⁹⁸ *Freedom of Information Act, Environmental Information Regulations: The exemption for legal professional privilege* (Information Commissioner Office 2008) <http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/legal_professional_privilege.pdf> July 1, 2011

There are two sub categories under commercial interest exemption: (i) trade secrets and (ii) prejudice to the commercial interests of any person (including the public authority holding the information).⁹⁹⁹ For trade secrets, there is a duty to confirm or deny if such information is being held, whereas for commercial interests, such duty can be removed, if there is a prejudice to the disclosure of the requested information.¹⁰⁰⁰ That also means that the trade secret exemption is a class-based one, requiring no harm test, whereas the commercial interest exemption requires it. In both cases, there is a public interest test. Both exemptions are aimed at protecting competitive advantage.¹⁰⁰¹

While what may constitute as a trade secret is somewhat clear,¹⁰⁰² “commercial interest” is extremely broad. Birkinshaw notes that the usual term employed is “commercial confidences” which signifies some degree of confidentiality

⁹⁹⁹ FoI Act 2000 (England) , s.43

¹⁰⁰⁰ FoI Act 200, s.43(3)

¹⁰⁰¹ For Trade Secret: Information may be commercially sensitive without being the sort of secret which gives a company a competitive edge over its rivals (p. 3) and for Commercial Information: commercial interest relates to a person’s ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services. (p.4) *Freedom of Information Act Awareness Guidance No. 5, Commercial Interests (Version 3)* (Information Commissioner Office 2009) <http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guide/s/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx> July 1, 2011

¹⁰⁰² According to the Law Commission: “We consider a provisional definition of the term “trade secret”. We think the term should apply to information (i) which is not generally known, (ii) which derives its value from that fact, and (iii) as to which its “owner” has indicated (expressly or impliedly) his or her wish to preserve its quality of secrecy”. Law Commission of Great Britain, *Legislating the criminal code : misuse of trade secrets ; a consultation paper* (H.M.S.O. 1997) para 1.29 See also Birkinshaw, *Freedom of information* p.168. Meanwhile, the ICO guideline employs four item tests:” (i) Is the information used for the purpose of trade, (ii) Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals? (iii) Is the information already known? (iv) How easy would it be for competitors to discover or reproduce the information for themselves?” , *Freedom of Information Act Awareness Guidance No. 5, Commercial Interests (Version 3)*

and that in other legislation¹⁰⁰³ the term used is “prejudiced to an unreasonable degree”.¹⁰⁰⁴ This is not the case with the FoI Act 2000 where prejudice alone is sufficient.

As a part of the exercise in determining “prejudice”, the ICO guideline suggested that the level of competition within the industry needs to be weighed. *“Where a company enjoys a monopoly over the provision of the goods or services in question it is less likely that releasing the information will have a prejudicial impact on that company.”*¹⁰⁰⁵

Since cases involving OFWAT are quite rare¹⁰⁰⁶ it would be useful to weigh another case under the FOISA¹⁰⁰⁷, which concerns a water utility.

S.33 (1) (a) and (b) (respectively trade secret and commercial interest) of the FOISA mimic the UK FoI Act 2000 s.43 (1) and (2) governing the same things, the exception being that the FOISA adds the words “prejudice substantially” with respect to commercial interest exemption, whereas the English FOI Act contains only the word ‘prejudice’. In theory this could mean that the FOISA’s threshold for non-

¹⁰⁰³ Clean Air Act 1993, s. 37; Control of Major Accident Hazard Regulations 1999, sch. 8, para. 18 See Birkinshaw, *Freedom of information* p.169

¹⁰⁰⁴ Ibid p.169

¹⁰⁰⁵ *Freedom of Information Act Awareness Guidance No. 5, Commercial Interests (Version 3)* p.6

¹⁰⁰⁶ Case search – up to 2011 – on the English FoI Commissioner’s website reveals only one result which involves OFWAT, the case concerns ‘legal professional privilege. See FS50273866 (*Water Services Regulation Authority*) Information Commissioner's Office The exemption under s 42(1) was upheld by the IC. Case search at the Information Tribunal reveals ‘none’.

¹⁰⁰⁷ Freedom of Information (Scotland) Act 2002, 2002 asp 13

disclosure is higher than its English counterpart with the result of more information being released,¹⁰⁰⁸ but whether this is true in practice needs further elaboration.

This case is also relevant for the English experience because Scottish Water (SW) is a regulated company (with Water Industry Commission for Scotland or WICS as the regulator) despite the fact that it is owned by the government.¹⁰⁰⁹ WICS also uses the RPI-X incentive based regulation in determining prices and also benchmarks SW's performance with their England and Wales counterparts.

In *MacRoberts and the City of Edinburgh Council*,¹⁰¹⁰ The Scottish FoI Commissioner had to consider whether city councils should release a copy of the list of the properties in respect of which the council collects water and waste water charges on behalf of Scottish Water. MacRoberts, the complainant (a firm of solicitors), does not require the details of the owner, proprietor or occupier of the premises.¹⁰¹¹ The councils denied the request by citing a number of exemptions,¹⁰¹² one of them is "Commercial Interest", under s.33(1)(b) of the FOISA, which mimics

¹⁰⁰⁸ The word 'substantial' is interpreted by authors as 'significant' or 'weighty' See Carter, M. and Bouris, A., *Freedom of information : balancing the public interest* (Constitution Unit, School of Public Policy, UCL 2006) p. 81

¹⁰⁰⁹ See Hendry, 'An Analytical Framework for Reform of National Water Law' for a complete account of the Scottish water industry

¹⁰¹⁰ *Decision 056/2006 MacRoberts and the City of Edinburgh Council* Scottish Information Commissioner

¹⁰¹¹ Ibid para 3

¹⁰¹² The council also used trade secret exemption, but was dismissed by the Scottish FoI Commissioner since it is obvious that such information does not constitute 'unique pricing calculation' or secret details of product and services, plus the fact that such information is distributed across local authorities in Scotland and that it is actually possible to discover such information through council tax data register, albeit entailing a considerable cost. Ibid See paras 82-86

s.43(2) of the UK FoI Act 2000, except with respect to the use of the word “substantial” as discussed above.

SW made representation on the case, and argued that under Water Industry Scotland Act (WISA), it may levy charges, at a reasonable fee, to obtain copies or extracts from the records it keeps.¹⁰¹³ It further explains that it fixes the charges for property search certificate, in the amount of 40 GBP, and that amount is routinely paid by search companies or solicitors wishing to know whether a property is connected to SW’s water supply, sewerage, whether they are charged using household, business or metered rates and whether any mains are located in a property, which may impact any future building plans.¹⁰¹⁴

The first question to be assessed was whether there is “substantial prejudice to commercial interest”.

Although not elaborated in detail on the case, *MacRoberts* actually concerns two different markets, first, is the market of information provision in which SW would benefit from disclosure and second, the market in natural monopoly of water supply, which may suffer prejudice because of disclosure due to the increase of charges. The prejudice from disclosure towards SW would be in the form of loss of income in the first market. This may also affect customer charges on the second market.

¹⁰¹³ Water Industry (Scotland) Act 2002, 2002 asp 3 See s.58 (5) (b)

¹⁰¹⁴ *Decision 056/2006 MacRoberts and the City of Edinburgh Council* paras 40 and 41. SW does not charge land owners who inspect records related to their own properties. They also do not charge inspections which are aimed at minimising damages to pipelines due to construction works on the site area. See para 44

The Scottish FoI Commissioner suggested that such a service (of SW providing property search certificates) is conducted “in competition” with search companies.¹⁰¹⁵ Actually it is not exactly clear how this came to be, since, if all information generated by search companies comes from SW, then SW will not be in direct competition with the search companies. What is true is that the provision of such information entails a search cost resulting from the use of GIS map data and access to records of connection consents.¹⁰¹⁶ It was argued that the charge imposed to the public helped them to relieve the burden of its operational cost.¹⁰¹⁷

However, the Scottish FoI Commissioner agreed that SW’s commercial interest would or would be likely to be “substantially” prejudiced.¹⁰¹⁸ The Scottish FoI Commissioner does not calculate the exact amounts of economic losses if access is free and so the term ‘substantial’ seemed to be taken for granted.

The second question is the public interest test. There is clearly a public interest in maintaining exemption, since it contributes to decreasing SW’s operational cost which may eventually lead to a reduction of actual price charges incurred to customers. There may also be a public interest in disclosure, since it reduces search costs incurred by search companies or other individuals.

There is a public interest in both markets (the market of information and the market of water supply), however, the Scottish FoI Commission was not satisfied that the Public Interest from disclosure of information – which would be directly enjoyed

¹⁰¹⁵ Ibid para 40

¹⁰¹⁶ Ibid para 90

¹⁰¹⁷ Ibid para 98

¹⁰¹⁸ Ibid para 92

by companies – would outweigh the Public Interest in charges enjoyed by customers.¹⁰¹⁹ It believes that SW is legally entitled to reap the benefit of information that it provides according to the charging schemes as approved by WICS and that the beneficiaries, if the information is released, will only be the commercial companies.¹⁰²⁰

It is interesting that the Scottish FoI Commissioner seemed inclined to dismiss the argument that benefit to the search companies from disclosure would be a “public interest”. The public interest test would require “*the consideration of whether or not release of the information would be in the interests of the public as a whole.*”¹⁰²¹ For the Scottish FoI Commissioner it seems a benefit to the search companies is not “the public as a whole”, therefore not the “public interest”, it would only be an “*individual interest or [...] sectional interest to particular groups in society*”.¹⁰²² Some writers argue that there is a lack of justification for a natural monopoly industry to possess commercial confidentiality¹⁰²³ and that such is considered an oxymoron.¹⁰²⁴ In

¹⁰¹⁹ “*I am of the view that, on balance, it would not be in the public interest for the information to be released given that the harm caused to Scottish Water’s commercial interests could impact upon water and sewerage charges issued to the public. I am satisfied that the public interest in increasing competition in the narrow area of the supply of information is not sufficient on its own to outweigh the public interest in avoiding a likely increase in charges.*” para 100 *ibid*

¹⁰²⁰ *Ibid* para 97

¹⁰²¹ *Ibid* para 98

¹⁰²² *Ibid* para 98 See also Feintuck, “*The public interest*” in *regulation* which suggests public interest in regulation as a “*linkage between constitutional values and semi-autonomous legal and regulatory systems*” conducted by restraining capital and individualistic values and justifying social regulation and existing independently from the economic argument of market intervention.

¹⁰²³ “*Consumer’s International argued in TC 224 that in a natural monopoly there is no justification for commercial confidentiality during the life of a contract, and we were not convinced that it is necessary even during a period of competitive tender, which is the justification usually presented.*” See Simpson, R., ‘Down and dirty: providing water for the world’ 14 CONSUMER POLICY REVIEW 146 TC 224 (Technical Committee 224) is the ISO committee in charge of setting the standard for water and waste

England, a DTI Green Paper also considered that that information about a monopoly business should generally be disclosable, whereas for markets opening up to competition, the extent of disclosure required should be correlated with the degree to which a company has market power.¹⁰²⁵ It is suggested that the more market power a player has, the more barriers should there be to non disclosure.¹⁰²⁶

All of those statements above might hold true, but not categorically true, since consumers' interests or public interest could be asserted through non-disclosure, as *MacRoberts* had demonstrated above. One must pay careful attention, however, that the public benefit of non-disclosure argued by the Scottish FoI Commissioner above arises because of an implicit assumption that the certificate fees are passed on to the

water service. Note that Simpon's argument here correlates with long-term contracts (concessions, lease or the like) and not fully divested companies.

¹⁰²⁴ *"In the case of the water companies, electricity distribution systems and local phone networks, the grounds for secrecy are especially suspect: these are monopolies which can make no serious claim that a competitor can use the information. But even where competition exists, this cannot justify concealment. "Commercial secrecy" is an oxymoron: secrecy is the enemy of free trade, information the lubricant of commerce".* Palast, G., Oppenheim, J. and MacGregor, T., *Democracy and Regulation: How the Public Can Govern Privatised Essential Services* (Pluto Press 2002) p. 185

¹⁰²⁵ Department of Trade and Industry, *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation* at Proposal 7.6

¹⁰²⁶ Baldwin and Cave, *Understanding regulation: theory, strategy, and practice* p.308. See also DGT Submission at para 5.20: *"This approach would accord with the DGT's present policy of greater disclosure where justified by the relevant company's market power or dominance. Publishing such information would help competition to develop as the imbalance in information is reduced and new entrants can take more rational investment decisions."* See also 'Review of Utility Regulation, Submission by the Director General of Telecommunications' OFCOM, http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/index.htm accessed February 11, 2010

consumer, in the form of lower prices.¹⁰²⁷ SW can do so, because they have no private shareholders to serve. Hence, the fact that SW is publicly owned played a role.

Had SW been a privately-owned company, as many of the water utilities in England are, would there be a public interest in maintaining exemption? Probably not, since the income from charging the release of information and records could be channeled to the shareholders through dividend, while the cost for information gathering is still charged to the customers. In this case, maintaining exemption would only serve *sectional interest to particular groups in society*¹⁰²⁸, namely, water utilities' private shareholders.¹⁰²⁹

¹⁰²⁷ "The release of such information under FOISA would, or would be likely to, significantly harm the finances of Scottish Water in relation to its property search services and this loss of income could in turn have the unintended consequence of driving up water and sewerage prices which would be to the detriment of the public at large." Decision 056/2006 MacRoberts and the City of Edinburgh Council para 97

¹⁰²⁸ Ibid para 98 See also Feintuck, " *The public interest*" in regulation which suggests public interest in regulation as a "...linkage between constitutional values and semi-autonomous legal and regulatory systems" conducted by restraining capital and individualistic values and justifying social regulation and existing independently from the economic argument of market intervention. Coppel argued that the scope of the Public Interest in the FoI Act 2000 (England) may not be as wide as those normally considered in ordinary courts. The Public Interest for exemption is constrained within that particular exemption, that is to say, if the exemption concerns commercial information or confidential obligation, the Public Interest that needs to be considered can be limited to either a person's commercial information or duty of confidence. See Coppel, P., 'The Public Interest and the Freedom of Information Act 2000' 10 Judicial Review 289 and , *Your right to know : the government's proposals for a Freedom of Information Act* para 3. However, this is only true for weighing "...the public interest in maintaining the exemption..." but not in weighing "...the public interest in disclosing the information" (both sentence taken from s.2(2)(b) of the FoI Act 2000 (England)). While the former is specified and can be curtailed in each exemption, the latter is wider.

¹⁰²⁹ That is, if the English Information Commissioner, Tribunals or the Courts consider shareholders as only 'a particular group of the society', and not 'the public as a whole'. The UK FoI Act 2000 (England) does not define "Public Interest", presumably, in order to achieve flexibility in its case-by-case application. There is no clarity on who the "Public" actually are. Guidelines only suggest that generally there is a public interest to disclosure, but this must be weighed against public interest in non-

Is downstream competition not a public interest? MacRoberts¹⁰³⁰ was accusing Scottish Water of exploiting its statutory monopoly on water and water information.¹⁰³¹ The question of competition was mentioned, but it was not considered to be relevant and not the *lex lata*¹⁰³² since the case was adjudicated in 2006 whereas retail competition for non-household customers was intended to be opened in 2008.¹⁰³³

Presumably, there would be a Public Interest towards increasing competition *only if* the disclosure on the first market (the market of information in the form of a list of properties) will have benefit of increasing competition on the second market (the market of water supply). This distinction is important because disclosure in the first market (market of the commodified information) may or may not increase

disclosure (See *Exemptions guidance, Public interest test* (Ministry of Justice 2011) <<http://www.justice.gov.uk/guidance/freedom-and-rights/freedom-of-information/foi-exemptions-public-interest.htm>> July 07, 2011). The IC guideline on Public Interest is also less helpful. It only suggests that “*The term “the public interest” is not defined in either the FOIA or the EIR. However something which is “in the public interest” may be summarised as something which serves the interests of the public*”. See Information Commissioner Office, *Freedom of Information Act, Environmental Information Regulations: The public interest test* (Information Commissioner Office 2009) <http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/FEP038_PUBLIC_INTEREST_TEST_V3.ashx> July 1, 2011

¹⁰³⁰ The fact that the complainant is a solicitor’s firm, without any clarity on its direct interest towards downstream competition will make consideration of public interest resulting from downstream competition difficult, although officially, the identity, motivation and position of the complainant is irrelevant for the purpose of examining public interest in FoI. The consideration might be different if the complainant is a company like *Smartsource*.

¹⁰³¹ *Decision 056/2006 MacRoberts and the City of Edinburgh Council* para 99

¹⁰³² “Although the retail market for non-domestic customers is being opened up to competition from 2008, I must consider the law as it now stands” *ibid* para 99

¹⁰³³ The Water Services etc. (Scotland) Act 2005, 2005 asp 3 acts as the legal basis for licensing for the retail companies. See also Parker, F., ‘The legalities of competition in water markets - comparing Scotland with England and Wales’ 18 *Journal of Water Law* 167

competition in the second market (market for water supply). This argument also depends on the statutory mandate for opening up water services to competition.

It is to be noted that in some practices of English FoI, the functioning of competition has been noted as a public interest. This occurred in procurement related cases in which there is a public interest in protecting fair market competition in public sector contracts (*Welsh Development Agency*)¹⁰³⁴ and in encouraging private sector participation in procurement (*Her Majesty's Revenue And Customs* (HMRC)).¹⁰³⁵ In one case, the IC mentioned the public interest to protect a newly liberalised state-owned company (*The Royal Mail*).¹⁰³⁶ However, in all of these cases, the public interest towards the functioning of a competitive market is served by maintaining the exemptions.

However plausible it may seem, arguing the functioning of a competitive market as the rationale of Public Interest disclosure might be a difficult one. This is because in most cases, Public Interest in disclosure has normally been argued only in terms of promotion of accountability, transparency, participation, or its general impact

¹⁰³⁴ There is “*an inherent public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for public sector contracts*”. *Welsh Development Agency Case*, Reference FS50097376 retrieved on November 18, 2009 from http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50097376.pdf

¹⁰³⁵ “However the Commissioner recognises that there is also a strong public interest in encouraging the wider involvement of the private sector in public procurement, to increase competition”. *Her Majesty's Revenue and Customs*. Reference FS50157117, para 57 retrieved on November 18, 2009 from http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50157117.pdf

¹⁰³⁶ The information is commercially sensitive. Royal Mail no longer has a monopoly over postal delivery and must now operate in a fully liberalised market place. Disclosure of the requested information is likely to harm its *competitive position*. *The Royal Mail Case*. Reference: FS50126145, para 18 (i), retrieved on November 18, 2009 from http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50126145.pdf

on the improvement of the quality of public discussion.¹⁰³⁷ As was argued in *MacRoberts*, the direct beneficiary from the disclosure by an “upstream” utility company is likely to be the “downstream” companies, not the public as a whole. Public Interest towards disclosure may arise, only if such disclosure would improve the development of competition, which leads to the expansion of consumer choice.

In order to invoke the proper working of competition as a Public Interest in disclosure, the following factors might need to be considered:

1. The causality between disclosure and enhancement of consumer choice. Unless the new market is matured, however, this may be difficult to ascertain.
2. The existence of specific legislation mandating liberalisation; competition in the market, or retail competition. The Cave Review was asked to be considered in *Smartsource* but was dismissed as the Upper Tribunal is concerned only with the water industry as it is today, “*not as it may look in the future*”.¹⁰³⁸ Retail competition was also considered in *MacRoberts* but was dismissed as it was considered not to be the law as it stands today.¹⁰³⁹
3. Interpretation of specific sections in the legislation, which leads to the conclusion that disclosure would be required. This will help with

¹⁰³⁷ Information Commissioner Office, *Freedom of Information Act, Environmental Information Regulations: The public interest test*

¹⁰³⁸ *Smartsource Drainage & Water Reports Limited v The Information Commissioner, Upper Tribunal Case No. GI/2458/2010* para 73

¹⁰³⁹ “Although the retail market for non-domestic customers is being opened up to competition from 2008, I must consider the law as it now stands” Decision 056/2006 *MacRoberts and the City of Edinburgh Council* para 99

contextualising Public Interest. It is likely that liberalisation would be conducted through legislative reforms, and followed by “active disclosure rules” such as the publication of trade prices,¹⁰⁴⁰ and the publication of the regulator’s methodology in assessing the value of a loss of comparator.¹⁰⁴¹ But there may be information required by potential entrants which is not tackled by sectoral regulation. The role of FoI/EIR will be in picking up what was left by sectoral rules, for example, in a bid to improve an entrant’s decision *whether, where and how to enter the market*.¹⁰⁴²

EIR

EIR Regulation 12(5)(e) exempts information if its disclosure ‘would adversely affect’ the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.¹⁰⁴³ Like any other EIR exemption, a Public Interest test is mandatory. A four-stage test from *Bristol City Council*¹⁰⁴⁴ is invoked by the ICO guideline¹⁰⁴⁵ in determining if the

¹⁰⁴⁰ The Cave review calls for the publication of trade price information in order to reduce the barriers of trading : “*To achieve this, legislation should enable the Environment Agency to collect and publish trade prices to provide greater information to traders about the potential value of licences* (p.116, ‘Recommendation Three’) Cave, *Independent review of competition and innovation in water markets: final report*

¹⁰⁴¹ Ibid p. 89 He explained: “*The benefits of a transparent assessment methodology are in giving merging parties much greater regulatory certainty about the criteria, weightings and methodology that OFWAT would use in the evidence that it submits to the Competition Commission*”. p. 91

¹⁰⁴² With respect to upstream bulkwater supply, Cave commented that there are significant barriers of entry: “*there are significant information asymmetries, alternative suppliers often have little information on which to decide whether, where and how to enter*”; *ibid* p.46

¹⁰⁴³ EIR 2004 (England) Regulation 12 (5) (e)

¹⁰⁴⁴ *Bristol City Council v IC and Portland and Brunswick Squares Association*, EA/2010/0012 Information Rights Tribunal para 8

¹⁰⁴⁵ *Confidentiality of commercial or industrial information, LTT160* (Information Commissioner's Office 2010)

exemption is engaged. It comprises of the questions: (i) Is the information commercial or industrial in nature? (ii) Is the information subject to confidentiality provided by law? (iii) Is the confidentiality provided to protect a legitimate economic interest? And (iv) Would the confidentiality be adversely affected by disclosure? The test is cumulative.

The striking difference between FoI and EIR is that the EIR attached confidentiality to commercial information, whereas confidential obligation is a separate exemption under FoI. Such confidentiality can only arise out of common law, contract or statute. Because of this, we will evaluate EIR Regulation 12(5)(e) further in another section below.

The EIR also contains a separate clause specifically exempting Intellectual Property Rights (IPR) information (subject to the harm and public interest test). The understanding of IPR covers anything from copyright, patents and trade secrets to new chemical constituents.¹⁰⁴⁶ For FoI only, trade secret was categorised specifically, whereas the other types of IPR will come under “commercial information” or “obligation of confidence”.

Customers’ databases (for the parts which are not covered by Data Protection legislation, but contains some form of ‘database’) and utility underground network assets data may be covered by this exemption.¹⁰⁴⁷ However, as the threshold for harm

<<http://www.ico.gov.uk/foikb/SectionsRegulations/FOIPolicyConfidentialityofcommercialorindustrialinformation.htm>> July 8, 2011

¹⁰⁴⁶ , *Environmental Information Regulations 2004 detailed guidance* Guidance 7

¹⁰⁴⁷ Copyright, Designs and Patents Act 1988, 1988 c. 48 s. 3A protects database, insofar as they are original

is higher than the FoI Act 2000 and there is a Public Interest test, the IC has been quite generous with respect to disclosures.¹⁰⁴⁸

In *Ofcom*¹⁰⁴⁹, the IC was also generous, granting the applicant's request to disclose the details of mobile phones base stations. Ofcom had actually provided a website to search base station antennas in the UK, but lacked the details requested by the applicant.¹⁰⁵⁰ Due to a disagreement on employing the public interest tests¹⁰⁵¹, the

¹⁰⁴⁸ See the two recent cases involving the University of East Anglia Climatic Research Unit *University of East Anglia* (FER0282488) Information Commissioner's Office *University of East Anglia* (FER0280033) Information Commissioner's Office

¹⁰⁴⁹ *Ofcom* (FER0072933) Information Commissioner's Office

¹⁰⁵⁰ 'Sitefinder, Mobile Phone Base Station Database' (*Ofcom*) <<http://www.sitefinder.ofcom.org.uk/search>> accessed July 7, 2011 The website (currently, as of July 2011) uses Google Map overlay to locate antennas and it provides information as to the height of the antenna, frequency range, transmitted power and the operator running it. Most of the information requested by the Applicant in January 2005 is available through one by one search at Ofcom's Sitefinder website. However, the applicant, which was an Information Officer for NHS Scotland, requested the whole information, up to the details of the Grid Reference, which is not provided by the Sitefinder website.

¹⁰⁵¹ Two EIR 2004 (England) exceptions were deemed to have been engaged: public security under Regulation 4(2)(b) and intellectual property rights Under Regulation 4(2)(e)), while the rest had been struck down at the lower courts, this includes exception under EIR Regulation 12(5)(e). The issue was whether the Public Interests for maintaining the exceptions needs to be balanced cumulatively before being weighted against the Public Interests for disclosure

case went all the way up to the UK Supreme Court,¹⁰⁵² which eventually referred it to the ECJ¹⁰⁵³ for a preliminary ruling.

5.5.2.3. Confidentiality obligation

FoI

Section 41 of the FoI Act 2000 exempts information if it was obtained by the public authority from any other person (including another public authority) and the disclosure of which by the public authority holding it would constitute a ‘breach of confidence’ actionable by that person.¹⁰⁵⁴ As s.41 contains the conjunctive ‘and’, both the elements of ‘obtained’ and the likelihood of breach of confidence should occur. This exemption is absolute, which means, no balancing test is required. However, a public interest can be employed as a court defence for a breach of confidence.

One of the criticisms against this exemption in the FoI Bill was that it gives too much flexibility and control on the part of utilities to declare information as

¹⁰⁵² *Office of Communications (Respondent) v The Information Commissioner (Appellant)* The Supreme Court of the United Kingdom; “The Supreme Court therefore refers to the Court of Justice this question: “Under Council Directive 2003/4/EC, where a public authority holds environmental information, disclosure of which would have some adverse effects on the separate interests served by more than one exception (in casu, the interests of public security served by article 4(2)(b) and those of intellectual property rights served by article 4(2)(e)), but it would not do so, in the case of either exception viewed separately, to any extent sufficient to outweigh the public interest in disclosure, does the Directive require a further exercise involving the cumulation of the separate interests served by the two exceptions and their weighing together against the public interest in disclosure?”” Ibid para 15

¹⁰⁵³ ECJ Advocate General supported the majority view held by the UK Supreme Court and recommends the ECJ decide that “the directive requires a further exercise involving the cumulation of the separate interests served by the two exceptions and their weighing together against the public interest in disclosure.” Case C-71/10, *Office of Communications v The Information Commissioner*, Opinion of Advocate General Kokott, delivered on 10 March 2011 European Court of Justice

¹⁰⁵⁴ FoI Act 2000 (England) , s.41

confidential.¹⁰⁵⁵ This may confuse regulators in separating those which are ‘commercial in confidence’ and those which are not.

One can imagine several scenarios where regulators ‘obtain’ information about utilities, for example, passively, by way of voluntary submission of information from the utilities or obligatory submission due to licence conditions¹⁰⁵⁶ or statutory¹⁰⁵⁷ requirements, and actively through the process of information gathering by the regulator in the course of an investigation.¹⁰⁵⁸ However, a contract concluded between a Public Authority and a third party does not constitute information ‘obtained’ by it.¹⁰⁵⁹

¹⁰⁵⁵ Fitch and Graham above. The UK’s Information Commission guidelines acknowledge the ‘flexibility’ and contextual nature of the law on confidence in common law. Freedom of Information Act Awareness guidance 2: Information provided in confidence. Available at http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/confidentialinformation_v4.pdf accessed in November 11, 2009

¹⁰⁵⁶ , *Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a water and sewerage undertaker under the Water Act 1989* Condition M

¹⁰⁵⁷ Water Industry Act 1991 (England) s 202.

¹⁰⁵⁸ For example, *Instrument of Appointment by the Secretary of State for Wales of Dwr Cymru Cyfyngedig as a water and sewerage undertaker under the Water Act 1989* Condition J. Under para 7 of Condition J, companies are required to submit, annually, Levels of Service Information and Service Target Reports, accompanied by certificates and signed by auditors. When an investigation as to whether the companies had actually achieved its targets or whether the certificates provided to OFWAT are accurate, OFWAT (subject to prior notice and at a reasonable hour) has the right to inspect properties and premises occupied by the utilities and make photocopies or extract records and carry out measurements and tests. (paras 8 and 9)

¹⁰⁵⁹ See *Derry City Council v Information Commissioner*, EA/2006/0014 Information Tribunal Para 32 (c) and (d) “the correct position is that a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act.” Also Hendry, ‘An Analytical Framework for Reform of National Water Law’ para 34 “Consequently the Contract terms were mutually agreed and therefore not obtained by either party”

A three-step test was developed in *Coco v A.N. Clark (Engineers) Limited*¹⁰⁶⁰ in order to determine the essential elements that will cause an actionable breach of confidence, and these are: (i) the necessary quality of confidence (i.e. the information is not publicly known), (ii) the confider is receiving information in which obligation of confidence can be inferred and (iii) disclosure not authorised by discloser may amount to damage to confider. This test is well adopted by the IC in its guidance,¹⁰⁶¹ as well as case-law.¹⁰⁶²

In *MacRoberts*, the Scottish FoI¹⁰⁶³ Commissioner adopted the three step test.¹⁰⁶⁴ The Commissioner concluded that list of properties served SW, whose charges are collected by local authorities, had been compiled by SW and is, therefore, not publicly known information. This deems to satisfy the first limb of the *Coco* test above. It was revealed that the agreement between SW and the Council contained a confidentiality clause¹⁰⁶⁵ and that SW threatened to sue the Council if it released

¹⁰⁶⁰ *Coco v A.N. Clark (Engineers) Limited* [1968] F.S.R. 415 Anne Lyons

¹⁰⁶¹ *Awareness guidance 2, Information provided in confidence* (Information Commissioner Office 2009)

<http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENTIALINFORMATION_V4.ashx> July 1, 2011 also *FOI Policy Knowledge Base, Test of confidence*, LTT93 (Information Commissioner Office 2009)

<<http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyTestofconfidence.htm>> July 1, 2011

¹⁰⁶² See for example *Derry City Council v Information Commissioner*, EA/2006/0014 para 34;

¹⁰⁶³ The provision in FoISA, s.36 (2) is similar to the English FoI s.36(2). According to FoISA s.36(2): Information is exempt information if (a) it was obtained by a Scottish public authority from another person (including another such authority); and (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person. Similar to the English FoI s. 41, s.36(2) of the FoISA is also an ‘absolute’ exemption (see s.2(2)(c) of the FoISA). This means that no balancing test is required for s.36(2)

¹⁰⁶⁴ *Decision 056/2006 MacRoberts and the City of Edinburgh Council* para 70.

¹⁰⁶⁵ *Ibid* The clause prohibits the release of any information relating to the agreement. Data supplied by SW to the Council and Data provided and received by the Council in relation to billing and collection of charges are also confidential. Para 67. The United Kingdom, *Scottish ministers code of practice on the*

information to MacRoberts.¹⁰⁶⁶ Respectively, this was deemed to satisfy the second and third limb of the *Coco* test. Finally, the public interest defence towards disclosure was also considered in *MacRoberts*¹⁰⁶⁷, which leads to the conclusion that it is not adequate to trump the Public Interest in maintaining exemption.

EIR

The Information Tribunal in *Ofcom* considered the confidence test in *Coco*. The Information Tribunal found that some detailed information about individual base stations had been released through another channel, without any confidentiality duty attached to it, through a roll-out programme organised between the mobile operator association and local planning authority.¹⁰⁶⁸ The information disclosed to local planning authorities is not exactly as requested by the applicant, but it is possible to match up information disclosed in the roll-out programme and that which is disclosed

*discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002 : laid before Parliament on the pursuant to section 60(5) of the Freedom of Information (Scotland) Act 2002 (Scottish Executive 2004) <<http://www.scotland.gov.uk/publications/2004/09/19894/42619>> January 5, 2011 at para 44 reads: “Any acceptance of such confidentiality provisions must be for a good reason, be capable of being justified to the Commissioner and include the proviso that information which is not, in fact, exempt under the terms of the Act or whose disclosure is required on public interest grounds, may have to be disclosed regardless of any agreement.” This was considered by the Scottish FoI Commissioner (see Para 69 of *MacRoberts*), only to be noted that the contract was in force before the Scottish FoI Code of Practice becomes valid. The Code of Practice at para 44 above is actually aimed at Public Sector Contracts and hence, to manage the relation between a contractor and a public authority and not to address the relation between two public authorities.*

¹⁰⁶⁶ *Decision 056/2006 MacRoberts and the City of Edinburgh Council*

¹⁰⁶⁷ This ranges from “enhancing the scrutiny of decision-making processes and thereby improve accountability and public participation”, “contributing to ensure that Council or Scottish Water are adequately discharging their functions” and “contributing to the effective oversight of the expenditure of public funds and that the public obtain value for money”. None of these was considered an adequate defence. Ibid para 76

¹⁰⁶⁸ *The Office of Communication (Ofcom) vs Information Commissioner and T-Mobile (UK) Limited, EA/2006/0078* Information Tribunal paras 4, 9, 55, 64

in the Sitefinder website. This significantly erases the quality of confidence which would otherwise be attached to the information.¹⁰⁶⁹ This would entail that even if the information is protected as a database and/or copyright, it still has to be disclosed, since it has no more quality of confidence.¹⁰⁷⁰

5.5.2.4. Policy Formulation and Internal Communication

S.35(1)(a) of the English FoI Act exempts “formulation” or “development” of government policy from FoI disclosure¹⁰⁷¹ and s.36 exempts information which, if released, will prejudice the effective conduct of public affairs. The difference between s.35 and s.36 is that the latter contains a prejudice test (as well as a public interest test) whereas the former contains only a public interest test. The rationale for exempting the information, however, is more or less similar, namely, to protect the quality of public policy.¹⁰⁷² When information is not caught under s.35, it may be caught under s.36.

¹⁰⁶⁹ Ibid para 64

¹⁰⁷⁰ Ibid para 66

¹⁰⁷¹ This section is to be read in conjunction with s.36

¹⁰⁷² *Awareness guidance 25, Section 36: Effective conduct of public affairs* (Information Commissioner Office 2008)

<http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/effectiveconductofpublic%20affairs.pdf> July 1, 2011 *Awareness Guidance 24: Policy Formulation, Ministerial Communications, Law Officers' Advice, and The Operation of Ministerial Private Office* (Information Commissioner Office 2008)
<http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/formulationofgovernmentpolicy.pdf> July 1, 2011

The term ‘policy’ in s.35 (1) (a) is deemed to have been well understood in practice.¹⁰⁷³ The term ‘government policy’ is intended to cover any policies coming out of Whitehall and Westminster including policies endorsed by individual ministers, although they have not been signed inter-departmentally.¹⁰⁷⁴

Timing appears to be a crucial issue in this exemption as it seeks only to protect ‘formulation or development’ of government policy and not after it has been concluded and implemented. The Information Tribunal has rejected the idea that a policy is like a ‘seamless web’, in that it is a continuing process. The Tribunal considers that there is a beginning and an end to a policy’s formulation and an interval between the end of the formulation and its development.¹⁰⁷⁵ What signals the end of the formulation period is then a question of fact and must be considered in a case by case basis. This could be a mere Parliamentary announcement, or a Bill receiving Royal Assent.¹⁰⁷⁶

What this means is that the current policy making activities on the restructuring of the English water industry, apart from papers and reports already released to the public, may be exempted from FoI disclosure. Until the water white

¹⁰⁷³ “Policy making is the process by which governments translate their political vision into programmes and actions to deliver ‘outcomes’ – desired changes in the real world” Blair, T. and Cunningham, J., *Modernising Government* (1999) p.15 Waller, P., Morris, R.M. and Simpson, D., *Understanding the formulation and development of government policy in the context of FOI* (2009) <http://www.ico.gov.uk/upload/documents/library/freedom_of_information/research_and_reports/ucl_report_government_policy_in_the_context_of_foi.pdf> July 11, 2011 p.15

¹⁰⁷⁴ Waller, Morris and Simpson, *Understanding the formulation and development of government policy in the context of FOI* p.15

¹⁰⁷⁵ *Ibid* Para 75 (v)

¹⁰⁷⁶ LTT62

paper is turned into legislation¹⁰⁷⁷, the deliberation forming the policies may not be able to be disclosed using FoI. Deliberation between OFWAT's board members may also be exempted either under s.35 or s.36.¹⁰⁷⁸

The danger of this exemption is that it may provide influence to a particular party in shaping policies through lobbying. There is, however, a Public Interest test to both s.35 and s.36. The Public Interest that has been considered includes (i) the understanding of the role of lobbyists, its mechanics and the relationship between government and a particular lobbyist including the influence they exert, (ii) the scrutinising of the probity of public officials and (ii) in providing the opportunity to present opposing views during policy development.

EIR Regulation 12 (4) (e) protects internal communication from disclosure. The rationale of the clause and the Public Interest consideration is similar to FoI Act 2000 s. 35 and s. 36, as discussed above. EIR 12 (4) (e) obligates no harm test.

5.6. Chapter Conclusion

This chapter elaborates the complexity of English water services' regulatory system. It starts with providing an overview of the English model, a brief history of its evolution, the role of the present day regulatory institution and how it may be re-regulated in the future. The next section discusses the regulatory decision making process at work. It begins by evaluating the transparency of the licencing process in

¹⁰⁷⁷ A white paper turned into legislation is one of the examples which signals that a formulation stage has ended. See Waller, Morris and Simpson, *Understanding the formulation and development of government policy in the context of FOI*

¹⁰⁷⁸ Fitch and Graham, 'The draft Freedom of Information Bill-implications for utilities'

England and Wales, analysing how OFWAT members are selected and removed and how transparently they can manage conflicts of interest. Section 4.3.4 explains how OFWAT acquire information from utilities and section 4.3.5 explains OFWAT's policy in disclosing information it had obtained for regulatory purpose. One notable experience of the English system is that the regulator is granted wide discretion to disclose regulatory information if it is in the public interest. This section also highlights that OFWAT's categorisation of excludable information developed out of practice and that in its implementation there is lack of consistency. What this signifies is that despite the categorisation of excisable information, both OFWAT and the utilities themselves are not really certain as to what information would be harmful for them if disclosure is to be made.

The next section explains that service level information in England is announced transparently in primary and secondary law and utilities' publications. Matters of non-compliance with service levels are dealt with transparently by OFWAT. If penalties against utilities are to be invoked, OFWAT will clarify the points of law and fact where violations occurred and provide rationale as to why it arrives at a certain "Determination". In the matter of utilities' investment, section 4.3.8 elaborates the two main concerns in investment issues: sewer flooding and leakage. In terms of sewer flooding, the thesis explains that there are stakeholders who are worse off due to a utilities' decision not to expand its sewerage capacity. The role of transparency is in enabling stakeholders to voice their concern and in scrutinising and influencing investment priorities. As for leakage, disclosure is required for meteorological data and its link with a utility's decision in building new reservoirs or reducing leakage in conjunction with the amount of revenue allocated for dividend payments. All of this information will hold utilities accountable for their investment decisions. The thesis also explains the stages of price determination in the English system and how the redress mechanism works for consumers and the companies.

The thesis also looks at corporate governance mechanisms in English water utilities. There is adequate transparency on corporate structure and board accountability mechanism if they are listed companies, but most transparency mechanisms are geared towards “members” and not the public. Information on related party transaction is excised, so there is no way for the public to scrutinise them except if they are disclosed through the FoI regime. As discussed, there is no consistency to the rationale of why they should not be disclosed. In the last part of corporate governance discussion, the thesis describes OFWAT’s approach to company restructuring and the delisting from capital markets. When utilities are delisted, they are no longer bound by certain disclosure rules. However, the lessons learned from England is that OFWAT still requires utilities to obey capital market rules as if their shares are listed there and at times also require utilities to lists their bonds.

Finally, on the passive disclosure rule side, the thesis demonstrates that the FoI rules are inapplicable to English water utilities. This, however, is subject to change because the FoI Act enables the Secretary of State to decide otherwise. Courts held that the EIR is also inapplicable to water utilities, but this is much less straightforward than for FoI because its applicability is determined by interpretation of statutory provisions. As such, it cannot be easily reformed too. Finally, on FoI exemptions, the thesis demonstrates the relationship between market power, ownership status (public/private) and its implications for disclosure. The thesis also came up with suggestions on how a public body should deal with disclosure cases involving the question of liberalisation in the water sector. See **Annex I** for the application of the analytical framework to England’s case study.

In the next chapter the thesis will discuss how transparency is practised and enabled in a different regulatory setting. Jakarta’s water utilities are publicly owned but engaged in private sector participations in the form of concessions. A regulator is

installed to monitor and mediate disputes. Thus, Jakarta embodies a 'hybrid' model where regulation by contract is applied, but with the help of a regulatory body. The next chapter will explain that the complexities of the regulation by contract mechanism in Jakarta may mean that it is less transparent compared to the full divestiture model in England.

6. JAKARTA

6.1. Overview of the legal and institutional framework

6.1.1. Central and Local Regulations

Water services in Indonesia are regulated by a combination of rules enacted at central and local levels. The primary legal basis for water services and resources management in Indonesia is the Undang Undang No.7 2004 on the management of Water Resources (Law 7/2004) passed by the central government.¹⁰⁷⁹ Out of 100 articles in Law 7/2004, only one article, article 80, is specifically dedicated to water services. The rest deals primarily with water resources management. In addition to Law 7/2004, the central government also issued an implementing regulation, the Peraturan Pemerintah No. 16 Year 2005 on the Development of Water Supply System (GR-16).¹⁰⁸⁰ Numerous decrees and guidelines have also been issued by Ministries of the central government but the guidelines do not constitute binding legal obligations.

Due to regional autonomy, water services become the responsibility of regional governments. Article 16.h of Law 7/2004 confirms this by requiring municipalities and regencies to be responsible for fulfilling the minimum daily basic need for water of its population.¹⁰⁸¹ The article does not detail whether this covers water for both sanitation and hygiene or whether it also encompasses sewerage services, neither does it contain any minimum quantity of drinking water that a regional government must guarantee.

¹⁰⁷⁹ Undang Undang No. 7 Tahun 2004 Tentang Sumber Daya Air

¹⁰⁸⁰ Peraturan Pemerintah No. 16 Tahun 2005 Tentang Pengembangan Sistem Penyediaan Air Minum

¹⁰⁸¹ UU No. 7 Tahun 2004 (Water Resources Law)

As the central government regulates water services only in general terms, there is more space for detailed regulation on a local level. This is performed for the most part through regional by-laws which are enacted by local parliaments. Regulation by regional-by laws must adhere to the principles laid down by higher forms of enactments and central government rules, such as Law 7/2004 and GR-16. However, in practice, conflict is often found between regulation and policies at central level and local level, especially common is conflict between guidelines issued by Ministries at central level and regional by-laws. When in contradiction with higher rules such as a law (enacted by the House of Representative at the central level) or a Government Regulation (a form of delegated legislation by the executive), regional by-laws and the other types of local rules could be annulled or revoked through a judicial review. Perusahaan Daerah Air Minum or PDAM (regional-owned waterwork companies – see below for more explanation) are established through regional by-laws. In addition to enacting PDAM's statutes, some regions also use regional by-laws to regulate water supply standards and customer service.¹⁰⁸² This is also the case with, Jakarta, the capital of Indonesia. Jakarta, a city with a population of 10 million, regulates its regional-owned waterwork utility PAM Jaya through two regional by-laws.¹⁰⁸³

¹⁰⁸² Peraturan Daerah Kota Bogor No. 4 Tahun 2004 Tentang Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor

¹⁰⁸³ Peraturan Daerah Khusus Ibukota Jakarta No. 13 Tahun 1992 Tentang Perusahaan Daerah Air Minum Daerah Khusus Ibukota Jakarta (PAM Jaya) and Peraturan Daerah Khusus Ibukota Jakarta No. 11 Tahun 1993 Tentang Pelayanan Air Minum di Wilayah Daerah Khusus Ibukota Jakarta

6.1.2. Jakarta's Water businesses

Jakarta's water businesses are comprised of a bulk water supplier, a regional-owned water utility company and two retail water companies, operating in the eastern and western parts of Jakarta, divided by the Ciliwung river.

6.1.2.1. Government-owned entities

6.1.2.1.1. Perum Jasa Tirta II

The bulk water supplier, PT Jasa Tirta II (PJT II), is a government-owned company with separated assets and liabilities from the state budget. The company was originally established in 1967 through a Governmental Regulation (GR) with the mandate to manage the Jatiluhur reservoir, dam and hydropower.¹⁰⁸⁴ The statute has been amended several times through various GRs, its latest being Government Regulation No. 7 Year 2010 (GR 7/2010) which also determines the PJT II's accountability line to ministers.¹⁰⁸⁵ The PJT II serves the bulk water needs of several regions including Jakarta. However, not all of Jakarta's bulk water needs are sourced from PJT II. Some are also derived from rivers and transfer from other provinces.

The purpose of PJT II according to GR 7/2010 is the provision of bulk water supply for drinking water, electricity, farming, industry, ports and other needs

¹⁰⁸⁴ PT Jasa Tirta II, 'Latar Belakang Pembentukan PT Jasa Tirta II' <<http://www.jasatirta2.co.id/pjtII.php?x=perusahaan&z=4babbbe88528a4346941e6300ae74486&y=detail>> accessed December 15, 2010

¹⁰⁸⁵ Peraturan Pemerintah No.7 Tahun 2010 Tentang Perusahaan Umum (Perum) Jasa Tirta II

requiring utilisation of water resources.¹⁰⁸⁶ The company is also in charge of managing a hydropower facility, the Juanda hydropower located at the Jatiluhur dam, and other small hydropower facilities on its river basins.¹⁰⁸⁷ The company is allowed to conduct other business activities such as tourism, consulting and land use services.¹⁰⁸⁸

6.1.2.1.2. PAM Jaya

PAM Jaya is a regional SOE owned by the Jakarta Regional Government, established under Jakarta Regional by-law 13 Year 1992 (By-law 13/1992).¹⁰⁸⁹ According to By-law 13 Article 5, its purpose is to “*fulfill the population’s need of drinking water in an effort to increase social welfare, to increase the income of the regional government and to be involved in developing the regional economy*”. Article 6 specifies PAM Jaya’s “main” purpose, which is “*to conduct all efforts directly related to the provision and distribution of drinking water, which fulfills the prerequisite of good health and to provide good services to the community by adhering to the company’s economic principles*”.¹⁰⁹⁰ Article 7 further enumerates that in order to carry out its purpose under the previous article, the company has the obligation to, among others, put effort into providing drinking water in accordance with the programme outlined by the regional government; develop, manage and maintain water treatment plants, bulk water sources, water storage facilities; develop

¹⁰⁸⁶ Ibid Article 4

¹⁰⁸⁷ Graham, C. and Prosser, T., *Privatizing public enterprises : constitutions, the state, and regulation in comparative perspective* (Clarendon Press 1991) Article 2.

¹⁰⁸⁸ ibid The list of river basins managed by Perum Jasa Tirta II is on Article 3

¹⁰⁸⁹ By Law 13/92

¹⁰⁹⁰ Ibid Article 6. It is not clear what the article means by “the company’s economic principles”.

and maintain public hydrants, water terminals and water tanks, install water mains and distribution pipes, conduct survey and data collection for the purpose of setting water tariffs, provide services for water connections from and for the society, companies, housing, hotels and others; document water meters, conduct billing and collect receivables in accordance with prevailing laws and regulations; enforce action against illegal users; provide drinking water for municipal facilities, assist the governor in regulating, licensing and controlling drinking water facilities conducted by third parties, provide licences and monitor installations in Jakarta territory and to develop its human resources and employees' welfare in order to increase public service.¹⁰⁹¹

By-law 13/1992 also determines the capital of PAM Jaya, which is separated from the Jakarta government's budget and assets.¹⁰⁹² The company may increase its capital in accordance with prevailing regulations.¹⁰⁹³ The company's capital may be derived from the accrual of internal funds (presumably through interest rates or other gains); capital injection from regional government funds; government and third party aid; and loans, including offshore loans.¹⁰⁹⁴

The corporate governance structure of PAM Jaya is stipulated under By-law 13/1992. The company organ consists of directors, a supervisory body and an internal supervisory body.¹⁰⁹⁵ There are rules on the appointment and dismissal of the utility's

¹⁰⁹¹Ibid Article 7. The article does not stipulate what sorts of permits/licenses PAM Jaya issues and the mechanism for obtaining them

¹⁰⁹² Ibid, Art 8

¹⁰⁹³ Ibid

¹⁰⁹⁴ Ibid, Article 10

¹⁰⁹⁵ Ibid Articles 11, 20 and 28

directors and the supervisory bodies.¹⁰⁹⁶ The utility is barred from conducting certain activities, such as entering into cooperation with third parties for more than one year, without the approval of Jakarta's regional governor. PAM Jaya's statute requires that a cooperation agreement with the length of more than one year shall require the governor's written approval. Nevertheless, it is silent as to the regulation of scope and types of cooperation. A concession agreement, for example, has a considerable length and scope. By-law 13 does not regulate specifically on this type of cooperation.¹⁰⁹⁷

Table 7: Recapitulation of laws and regulation establishing Jakarta's Water Business

No.	Corporation	Function/Area	Legal basis of incorporation
	Perum Jasa Tirta II	Government-owned bulk water supplier, not only for Jakarta province but also for other provinces on the western part of the Java Island	SOE Law 19/2003, GR 74/2010 (Statute of PT Jasa Tirta II)
	Perusahaan Daerah Air Minum Jakarta (PAM Jaya)	Regional government; Regional government-owned retail water service for the whole Jakarta region	Regional SOE Law No.5/1962, Regional by-law 13/1992 (Statute of Pam Jaya), By Law 11/1993
	PT PAM Lyonnaise Jaya (Palyja)	Concessionaire of PAM Jaya, responsible for retail water supply in the eastern part of Jakarta	Corporation Law 40/2007, Company's Deed of Establishment

¹⁰⁹⁶ Ibid Article 17 and 26

¹⁰⁹⁷ Ibid Article 15. Other types of activities requiring written consent from the governor are encumbrance of assets, obtaining offshore and onshore loans and acquisition of shares in another companies

	PT (formerly Thames Jaya)	Aetra PT PAM	Concessionaire of PAM Jaya, responsible for retail water supply in the western part of Jakarta	Corporation Law 40/2007, Company's Deed of Establishment
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6.1.2.2. The Cooperation Agreement

The other institutions involved in providing Jakarta's drinking water are PT Aetra (formerly TPJ) and PT Pam Lyonnaise Jaya (Palyja). Both of them are private companies established under the Corporation Law. Before embarking on the legal and regulatory environment in which these institutions operates, it is important to explain the historical setting which led to the involvement of the private sector in Jakarta's water supply.

There is a vast literature addressing the problems of the Jakarta water concession, among other Bakker¹⁰⁹⁸, Kooy¹⁰⁹⁹, Iwanami¹¹⁰⁰, Argo¹¹⁰¹, Jensen¹¹⁰²,

¹⁰⁹⁸ Bakker, K., 'Conflicts over water supply in Jakarta, Indonesia' in B Barraqué and E Vlachos (eds), *Urban Water Conflicts, an analysis on the origins and nature of water-related unrest and conflicts in the urban context* (UNESCO Working series SC-2006/WS/19. 2006) Bakker, 'Trickle Down? Private sector participation and the pro-poor water supply debate in Jakarta, Indonesia'

¹⁰⁹⁹ Kooy, M.É., 'Relations of power, networks of water: governing urban waters, spaces, and populations in (post) colonial Jakarta' (University of British Columbia 2008)

¹¹⁰⁰ Iwanami and Nickson, 'Assessing the regulatory model for water supply in Jakarta'

¹¹⁰¹ Argo, T.A., 'Thirsty downstream: the provision of clean water in Jakarta, Indonesia' (University of British Columbia 2001)

¹¹⁰² Jensen, O., 'Troubled Partnerships: Problems and Coping Strategies in Jakarta's Water Concessions' (4th Conference on Applied Infrastructure Research Berlin) <http://www.infraday.tu-berlin.de/fileadmin/documents/infraday/2005/papers/jensen_Troubled_Partnerships_Problems.pdf>

Ardhianie¹¹⁰³, Nugroho¹¹⁰⁴, Braadbaart¹¹⁰⁵ and Lanti¹¹⁰⁶, including investigative reports from Harsono.¹¹⁰⁷ All of these literatures provide negative accounts of Jakarta's water privatisation, both from the point of view of its governance process and the concession's overall performance. Except for Lanti's paper, however, none of them pays specific attention to possible legal and regulatory solutions.

In late 1991, the World Bank and a foreign aid organisation from Japan provided a loan to PAM Jaya, in order to repair and expand its infrastructure.¹¹⁰⁸ Soon after the loan was provided, the World Bank approached the Indonesian government to allow private sector participation in Jakarta's water system. In 1995, the coverage of PAM Jaya was only 45%, 30% of which receives intermittent supply¹¹⁰⁹. In 1996 the percentage of Unaccounted for Water was more than 55%. Due to these problems, more investment was needed in order to expand its coverage.¹¹¹⁰ The government at that time thought that inviting the private sector would result in lower tariffs and bring

¹¹⁰³ Hadipuro, W. and Ardhianie, N., *Amandemen Kontrak Konsesi Air Jakarta* (2008)

¹¹⁰⁴ Nugroho, R., *Dilemma of Jakarta Water Service Post Public Private Partnership (PPP)* (2009)
Nugroho, R., *Reasons Not To Privatize Water Undertaking* (2010)

¹¹⁰⁵ Braadbaart, O., 'Privatizing water. The Jakarta concession and the limits of contract' *A World of Water Rain, Rivers and Seas in Southeast Asian Histories* 297

¹¹⁰⁶ Lanti, A., 'A regulatory approach to the Jakarta Water Supply concession contracts' 22 *International Journal of Water Resources Development* 255

¹¹⁰⁷ Harsono, 'When Water and Political Power Intersect' Harsono, A., 'Water and Politics in the Fall of Suharto' *The Center for Public Integrity* <<http://www.publicintegrity.org/water/report.aspx?aid=52>> accessed 11 October 2006

¹¹⁰⁸ See Harsono, 'When Water and Political Power Intersect' Harsono, 'Water and Politics in the Fall of Suharto'

¹¹⁰⁹ See Jensen, 'Troubled Partnerships: Problems and Coping Strategies in Jakarta's Water Concessions'

¹¹¹⁰ Lanti, 'A regulatory approach to the Jakarta Water Supply concession contracts'

investment to repair leaked networks, and so put an end to the city's ailing water infrastructure.¹¹¹¹

Thames acted first¹¹¹² by forming an alliance with Sigit Harjojudanto who was the son of the ruling President Soeharto¹¹¹³ in exchange for a 20% ownership of the project company. This move was later followed by Suez in forming an alliance with the Salim group, also an associate of the former President Soeharto.¹¹¹⁴

Soeharto's regime was a centralised regime. The central government decided what was considered best for the regions, including Jakarta. Neither the local Jakarta parliament nor the Governor at that time dared to challenge Soeharto's order. Without any public tender and to the disappointment of the World Bank¹¹¹⁵, Soeharto finally agreed to privatise Jakarta's water supply in 1995 and subsequently ordered the Ministry of Public Work at that time to divide Jakarta into two service regions bordering the Ciliwung river.¹¹¹⁶ One part was to be given to his son Harjojudanto and

¹¹¹¹ See Braadbaart, 'Privatizing water. The Jakarta concession and the limits of contract'

¹¹¹² Harsono, 'When Water and Political Power Intersect' Harsono, 'Water and Politics in the Fall of Suharto'

¹¹¹³ According to Harsono: *"It [Thames] formed an alliance with Harjojudanto, a notorious gambler among Jakarta's elite circle with no experience in the water business. Thames set up an Indonesian subsidiary and gave him a 20 percent interest. For Thames, forging an alliance with a Suharto was a question of realpolitik. "At the time, any company dealing with Indonesia would have to deal with almost some element of the Suharto family because of the way the government was set up," said Peter Spillett, head of environment, quality and sustainability for Thames."* Harsono, 'When Water and Political Power Intersect'.

¹¹¹⁴ "Access to politics is essential. The water business is always political, Bernard Lafrogne, a Suez representative in Jakarta, told me. [Harsono] See *ibid*

¹¹¹⁵ See Braadbaart, 'Privatizing water. The Jakarta concession and the limits of contract'

¹¹¹⁶ Braadbaart suggests that it was Sigit who persuaded his father, President Soeharto, to privatise Jakarta's water. *Ibid*

Thames, and the other half was to be provided to the Salim group and Suez. The negotiation process took two years.

However, PAM Jaya and its employees had a direct interest in the privatisation plan and so initially resisted the concession contract.¹¹¹⁷ PAM Jaya has a strategic position as the owner of water infrastructure assets and has been the operator of the services since its inception and will be the institution that receives the assets back from the concessionaires after the contract periods end. Only after pressure from the central government did PAM Jaya finally accept the plan.¹¹¹⁸

As Braadbaart notes, the contract was signed with the most important contractual risks borne by PAM Jaya: (1) currency risk, (2) gradual tariff increase and projected sales and (3) bulk water supplies. One of the most fatal blows to the contractual design is linking the security of these risks to the private sector's performance. In the event that PAM Jaya failed to secure the risks, the private sector would not be obligated to materialise its commitments.¹¹¹⁹

¹¹¹⁷ Jensen quoted a story where a PAM Jaya director at that time, Rama Boedi, refused to attend the signing ceremony. The interest of PAM Jaya in resisting privatisation, however, cannot be interpreted as entirely benevolent. Jensen, 'Troubled Partnerships: Problems and Coping Strategies in Jakarta's Water Concessions' Jensen, O. and Blanc-Brude, F., 'The Handshake: Why do Governments and Firms Sign Private Sector Participation Deals? Evidence from the Water and Sanitation Sector in Developing Countries' SSRN eLibrary With PAM Jaya still objecting to a number of issues, the contract was signed. Braadbaart, 'Privatizing water. The Jakarta concession and the limits of contract'

¹¹¹⁸ It was also Sigit (President Soeharto's son) who took the issue to his father when negotiations with PAM Jaya and the Governor's office almost ended in a deadlock. Soeharto then set the cut-off date for the negotiation process. Braadbaart, 'Privatizing water. The Jakarta concession and the limits of contract'

¹¹¹⁹ In one interview, a member of the JWSRB demonstrated the private sector's and their lawyer's stance that the contract is not measured by performance. Hence, there is an inherent lack of incentive for

PAM Jaya's strategic bargaining position at that time is reflected in the 1998 contract and the 2001 contract restatement: PAM Jaya is both a party to the contracts with the concessionaires and a "regulator" at the same time, responsible for monitoring and supervising the contractual provisions.¹¹²⁰ Its consent, jointly with the concessionaire,¹¹²¹ is also required to withdraw revenue from tariff collection from the escrow account.

In 1998, following the Asian monetary crisis, riots broke out. The executives and expatriates of these concessionaires fled to Singapore to seek refuge, while Palyja (the Suez subsidiary) left only one person in charge of its management.¹¹²² Fearful of poisoning and contamination, the director of PAM Jaya demanded that the concessionaires relinquish control of their operations and pressed them to hand the company back to the public.¹¹²³ The concessionaire agreed that the company's operation would be transferred but was furious with the pressure to end the concession

the private sector to achieve service level targets in the contractual design. Personal Communication, *Field Interview with Stakeholders, Jakarta, January 11, 2011*

¹¹²⁰ This conflicting role – as a regulator and a party to the contract at the same time – is not advisable in common regulatory structures. Regulators need to be independent in order to have an arm length's relationship with politicians and the regulatee. Therefore, they are often accorded a specific mandate through legislation and have their budget and salary structures separated from the executive branch. See Smith, 'Utility regulators: the independence debate'. Compare Jakarta's regulatory structure and independency of the regulatory bodies with Victoria (Section 4.3.2 and 4.3.3 above) and England (Sections 5.3.2 and 5.3.3 above)

¹¹²¹ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001

¹¹²² See Harsono, 'Water and Politics in the Fall of Suharto' Harsono, 'When Water and Political Power Intersect'

¹¹²³ Harsono, 'Water and Politics in the Fall of Suharto' Harsono, 'When Water and Political Power Intersect'

contract. Finally, the executives fled back to Jakarta and threatened to bring the case to international arbitration.¹¹²⁴

In May 1998, Soeharto stepped down and was replaced by the Habibie government. Due to the UK's and France's diplomatic lobbies and fearing that further conflict with multinationals would drive away foreign investment, the Habibie government agreed to keep the concession contracts and, in turn, both Suez and Thames agreed to renegotiate the terms of the contracts.¹¹²⁵ In the aftermath of Soeharto's downfall, his cronies were hunted down for corruption charges and were becoming the target of public resentment. Both the Salim group (who partnered with Thames) and Harjojudanto (partnered with Suez) then became a liability rather than an asset. The concessionaires finally decided to terminate their ties with the former President Soeharto's cronies, each having to pay dearly the price to repurchase the shares and other severance fees.

Although both TPJ and Palyja lost income for two consecutive years following the financial crisis¹¹²⁶, both companies did not decide to terminate their contracts although the contracts do provide for the concessionaire to be repaid for the investment it made during the lifetime of the contract – the so called 'termination fee'. Jensen theorises that the concessionaires thought that this would be unlikely due to the government's financial situation following the 1998 monetary crisis. Had the concessionaires decided to exit during that period, they might have left the country

¹¹²⁴ Harsono, 'Water and Politics in the Fall of Suharto' Harsono, 'When Water and Political Power Intersect'

¹¹²⁵ Harsono, 'Water and Politics in the Fall of Suharto' Harsono, 'When Water and Political Power Intersect'

¹¹²⁶ Jensen, 'Troubled Partnerships: Problems and Coping Strategies in Jakarta's Water Concessions'

without anything other than a substantial loss. Another factor could be the multinationals' own corporate strategy in the region.¹¹²⁷ With 300 or more water utilities operating and around 230 million residents, Indonesia is a potential market and thus it is probably not a good idea to end a dispute with arbitration. The other signatories to the concession, the Jakarta Governor and PAM Jaya, also have an interest in preserving the concession, as depicted on the following table:

Table 8: Jakarta's Water Concession, actors and their interest (Jensen, 2005)¹¹²⁸

Actor	Interest
Pam Jaya	Maximise status/employment/budget/scope of responsibility Reduce financial indebtedness Minimise chances of intervention by local or central government
Governor	Maximise domestic political support Minimise chances of central government intervention Maintain international reputation
Palyja/Aetra (formerly TPJ)	Maximise returns over the life of the contract Comply with firm's international strategy Minimise current losses Minimise financial risk

In 2001, the concessionaires, PAM Jaya and the Jakarta government, amended the terms of the contracts. Two identical Cooperation Agreements were prepared, one between PAM Jaya and TPJ (now Aetra) and the other between Palyja and PAM Jaya. Both contracts contain the signature of Jakarta's Governor at that time, Sutiyoso. The

¹¹²⁷ Ibid

¹¹²⁸ Ibid

2001 restatement contract then captured and preserved the power structure of the 1998 contract, with the exception that another player was added on to the regulatory system, albeit with a vague mandate and responsibility: the Jakarta Water Sector Regulatory Body (JWSRB). The conflicting roles of PAM Jaya, JWSRB and the Jakarta Governor jointly as a regulator will be discussed in the next sub-section.

Five years later, in 2006, the companies sold a substantial portion of their shares. Suez sold 49% of its shares to Astratel and Citigroup and Thames completely withdrew from its Indonesian business, selling 95% of its shares in TPJ to a Singaporean consortium, Aquatico and the other 5% to Alberta Utilities. TPJ later changed its name into “Aetra”.

6.1.2.3. Aetra

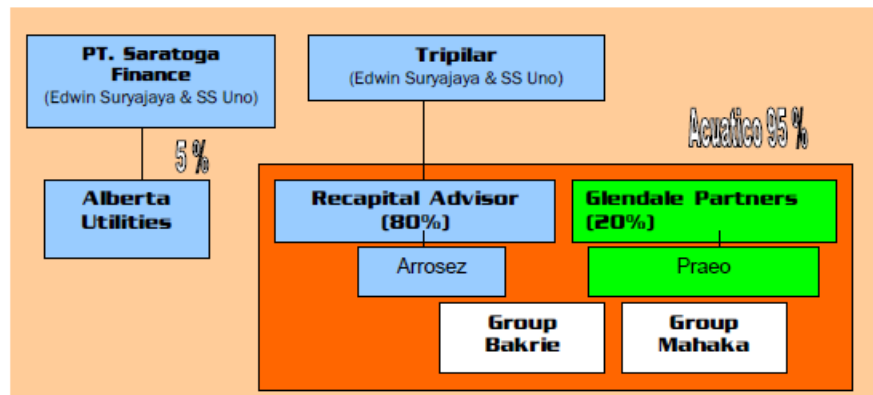
Aetra (formerly TPJ) was a subsidiary of Thames but later Thames withdrew and sold all of its shares to a Singaporean consortium, Aquatico.¹¹²⁹ The ultimate owner of Aetra through Aquatico is said to be Recapital Advisors (80%) and Glendale Partners (20%). Both companies own Aquatico through layers of Special Purpose Vehicles (SPV): Arrosez (Recapital) and Praeo (Glendale), both of which are British Virgin Island SPVs.¹¹³⁰

¹¹²⁹ PT Aetra, <http://www.aetra.co.id/ID/ir_pemegang_saham.htm> accessed February 12, 2011

¹¹³⁰ Sawitri, A.S., ‘Committee questions Aquatico’s suitability as tap water operator’ *The Jakarta Post* (Jakarta, 11/30/2006) <<http://www.thejakartapost.com/news/2006/11/30/committee-questions-acuatico039s-suitability-tap-water-operator.html>> accessed February 12, 2011 Sawitri, A.S., ‘Regulatory body casts doubt on takeover bid’ *The Jakarta Post* (Jakarta, 12/14/2006) <<http://www.thejakartapost.com/news/2006/11/30/committee-questions-acuatico039s-suitability-tap-water-operator.html>> accessed February 12, 2011

Due to the use of SPVs, PAM Jaya, and the Jakarta Regional Government who awarded the Cooperation Agreement to TPJ (later Aetra) were unable to find the link between TPJ and its ultimate owners. Only after the Jakarta Regional Government threatened to block the transfer of shares, legal opinion from the buyer's lawyers was presented, certifying the link of ownership from Aquatico to TPJ. It is not known if the Jakarta Regional Government had been able to obtain all true and certified copies of the company's deeds, including the two British Virgin Island SPVs, Arrosez and Praeo, in addition to legal opinion. Aetra's 2009 annual report does not contain any reference to the two British Virgin Island SPVs above.¹¹³¹

Figure 4: Aetra's ownership structure (Ardhianie, No Year)¹¹³²



TPJ later changed its name to Aetra and issued several types of bonds in the capital market, to be matured respectively, in 2011, 2013 and 2015.¹¹³³ Due to this

¹¹³¹ PT Aetra Air Jakarta, *Laporan Tahunan PT Aetra Air Jakarta Tahun 2009* (2009) <<http://www.aetra.co.id/docs/LaporanKeuanganAetra2009.pdf>> February 12, 2011

¹¹³² Ardhianie, N., *Kontroversi Penjualan PT Thames Pam Jaya (TPJ)* (Amrta Institute for Water Literacy No Year)

bond issue, Aetra is bound to comply with Indonesian capital market regulations. The participation of Aetra in the capital market is supposed to be able to transform its corporate governance structure and enables more transparency compared to other utilities which are not bound by capital market rules.

6.1.2.4. Palyja

Palyja is incorporated under the Corporation Law. Fifty-one percent (51%) of Palyja's share is owned by Suez Environnement. The other 30% is owned by Astratel Nusantara, an arm of the Indonesian-based Astra group which concentrates on infrastructure business, while the other 19% is owned by Citigroup financial.¹¹³⁴ During an interview, the author was informed that Palyja does not use any intermediaries in its shareholdings with Suez Environnement.¹¹³⁵

6.1.3. Sectoral rules and regulatory institutions applicable to Jakarta water businesses

6.1.3.1. Ministry of Home Affairs, Ministry of Public Works, The National Planning Agency

¹¹³³ PT Aetra, 'Obligasi' (2008) <http://www.aetra.co.id/ID/ir_obligasi.htm> accessed February 12, 2011

¹¹³⁴ PT PAM Lyonnaise Jaya, 2009 *Annual Report* (2009) <http://id.palyja.co.id/___wysiwyg/filemanager/files/AnnualReport2009website.pdf>

¹¹³⁵ Personal Communication, *Field Interview with Palyja, Jakarta, January 10, 2011*

The Ministry of Home Affairs (MOHA) is in charge of anything related to regional autonomy. This includes the drafting of Governmental Regulations implementing the regional autonomy laws and the arrangement of fiscal administration policy at regional level. For the water sector, the regulatory product issued by the MOHA includes the guidelines for tariff setting¹¹³⁶, financial accounts¹¹³⁷ and performance assessment.

The Public Works Ministry is responsible for assisting regional governments in developing water supply systems in its respective regions. A section of regional government called “Dinas Pekerjaan Umum” (Public Works Agency) works in coordination with the Public Works ministry. The ministry also recently set up a consultative body to speed up the developments in the water supply system, the BPP-SPAM.¹¹³⁸ In practice, the BPP-SPAM is involved as a representative of the central government in assisting regional governments in its negotiation with the private sector in Private Sector Participation (PSP) projects.

Various forms of foreign assistance and projects made under foreign loans must go through the National Development Planning Agency (Bappenas). Although in theory the regions are free to enter into loan agreements with foreign parties, in most situations, an endorsement from the National Planning Agency would be necessary. The agency also formulates long-term and medium-term national strategic development planning on both water resources and services sector.

¹¹³⁶ *Peraturan Menteri Dalam Negeri No. 23 Tahun 2006 Tentang Pedoman Teknis dan Tata Cara Pengaturan Tarif Air Minum Pada Perusahaan Daerah Air Minum*

¹¹³⁷ *Peraturan Menteri Dalam Negeri No. 61 Tahun 2007 Tentang Pedoman Teknis Pengelolaan Keuangan Badan Layanan Umum Daerah*

¹¹³⁸ See Peraturan Pemerintah No. 16 Tahun 2005 (GR-16), Chapter VI

There is no full coverage of water services and tap water is not potable, which means that there are tensions and trade offs in utilities' investment decisions between network expansion and higher water quality. Piped water accounts for only 18.38% of total households (in 2006), while the rest, 43.57% of households, access water through 'protected' sources.¹¹³⁹ The overall percentage of households with 'improved' access to a water source (both rural and urban, pipe and non piped) in 2009 is 47.71%, which signifies that more than half of the total households have unimproved access.¹¹⁴⁰

The 2010 National Medium-Term Development Plan (RPJM) covering a four year period from 2010 to 2014, pledged to increase piped coverage to 32% by 2014.¹¹⁴¹ The formulation of these national long- and medium-term policies is conducted bottom-up, from the lowest level of government, that is villages, up to the municipal and central government. The practical implication of these policies is that loan and grant funds must be channelled according to policy requirements.

6.1.3.2. Jakarta Regional Government

The Jakarta Regional Government is both a signatory to the Cooperation Agreement and the regulator of the contract. Jakarta Regional By-law 13 Year 1992 states states that:

¹¹³⁹ Indonesia; Badan Perencanaan Pembangunan Nasional (Bappenas), *Rencana Pembangunan Jangka Menengah Nasional 2010-2014* (2010) II.5-10 and II.5-11

¹¹⁴⁰ Indonesia; Badan Perencanaan Pembangunan Nasional (Bappenas), *Report on the Achievement of Indonesia's Millennium Development Goals 2010* (2010) Access through unprotected dug well, unprotected spring, small cart with tank/drum and tanker truck; surface water (river, dam, lake, pond, stream, channel, irrigation channel) and bottled water are considered "unimproved".

¹¹⁴¹ Indonesia; Badan Perencanaan Pembangunan Nasional (Bappenas), *Rencana Pembangunan Jangka Menengah Nasional 2010-2014* Tabel 5.12 Buku II Bab 5

*“The Directors [of PAM Jaya] must obtain a written approval from the Governor on the following matters:” (i) entering into cooperation [with a third party] for a period longer than one year, (ii) obtaining onshore or offshore loans, (iii) acquiring, transferring or encumbering any immovable properties, (iv) acquiring the shares of another company and (v) in performing any other substantial matter in connection with PAM Jaya’s management and operation”.*¹¹⁴²

Article 13 and the other provisions do not provide any clue as to what it meant by ‘substantial matter’. Presumably, the signature of the Jakarta Governor on the Cooperation Agreement is to fulfil the requirement of approval in the above article and not as a party to the concession agreement. If this interpretation is correct, this would mean that the Jakarta Governor and its apparatus are not bound by the contractual provision – including the confidentiality clause – unless they sign another follow-up confidentiality agreement.

The role of the Jakarta Regional government as a regulator to the contract is mainly derived from Regional By-Law 13 as discussed above as well as Law No. 7/2004 and GR-16, although the application of these two national laws has some complication of its own. This will be discussed further later. As discussed above, under Law No. 7, regional governments are obliged to fulfil their population’s daily basic needs for water. GR-16 further said that regional governments must formulate policy and strategy to develop the water supply system in their territory, through public consultation.¹¹⁴³ They must also enact minimum standards of service for the

¹¹⁴² By Law 13/92, Article 15.1

¹¹⁴³ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16), Article 24.

undertakers to comply with¹¹⁴⁴, conduct performance monitoring and evaluation, issue licences¹¹⁴⁵ and ensure the continuity of bulkwater supply.¹¹⁴⁶

The most salient regulatory feature is its power in determining tariffs. Article 60(7) of the GR-16 stipulates that tariffs – when services are contracted out –are determined by the head of regional governments (the Jakarta Governor in this case), “*based on the agreement to supply drinking water*”.¹¹⁴⁷ The question to be asked is whether the contract between Palyja/Aetra and the Jakarta regional government respectively are covered by Article 60, in which case, it thus provides the authority of the Jakarta government in regulating tariffs. Article 60, unfortunately, does not stipulate what is meant by ‘agreement’.

A clue to what Article 60 meant by ‘agreement’ may come from Article 64.¹¹⁴⁸ Article 64 (1) reads “*the cooperatives and/or privately owned business enterprise may participate in the development of drinking water provision system in regions which is not yet covered by services provided by SOE or regional SOEs*”. The article may have two different interpretations: it may appear either to suggest that Private Sector Participation is allowed only for *Greenfield* projects, in regions which are entirely not covered by SOE, or, it may suggest that PSP is allowed for both an entirely Greenfield project and in regions where SOE coverage is already present, but full coverage is not yet achieved. If the second is to be taken, this would mean that the

¹¹⁴⁴ Ibid, Article 34.2.

¹¹⁴⁵ Ibid, Article 65.3.

¹¹⁴⁶ Ibid, Article 59.1.

¹¹⁴⁷ Ibid, Article 60.7.

¹¹⁴⁸ Ibid, Article 64.

Article advocates the unbundling of the utility service, by allowing network extensions to be provided by the private sector.

The fifth paragraph of Article 64 reads: “*The cooperatives and/or the private sector which are granted the rights through an action as stipulated in paragraph 3, enters into agreement in providing drinking water with the government or the regional government, in any case relevant.*”¹¹⁴⁹ Hence, GR-16 (Article 64.5) envisages that agreement shall be entered into between the regional or central government and the private sector on the condition that ‘no coverage’ exists.¹¹⁵⁰ This reflects a change of government policy in contracting water services, from business to business to business to government. None of the two conditions above is fulfilled on the 2001 concession contract. First, the 2001 Cooperation Agreements are not made between Palyja/Aetra with the Jakarta Regional Government but with PAM Jaya (a business to business arrangement)¹¹⁵¹ and secondly, it is clear that the contract is

¹¹⁴⁹ Ibid, Article 60.

¹¹⁵⁰ Ibid, Article 64.1.

¹¹⁵¹ Jensen stated that where a concession agreement was entered into between the incumbent utility and the concessionaire, where the incumbent has the role in monitoring the contract, it often ends in failure. The interest of the incumbent utility is in diametric opposition with the interest of the concessionaire. Jensen, ‘Troubled Partnerships: Problems and Coping Strategies in Jakarta’s Water Concessions’. Entering into a cooperation contract through a business-to-business (B2B) scheme is often done to evade scrutinies from the local parliament and cumbersome procurement rules which entail high transaction cost. One of ADBs consultancy reports literally suggests a B2B model between Indonesian waterwork companies/PDAM and the private sector in order to avoid involvement of the local parliament and minimise procurement cost. See Hermawan, I., *Supporting and Facilitating PDAMs and Pemas embarking on the path of corporatization and regionalization* (October, 2008)

applicable in a region where an SOE service – which is PAM Jaya – is already present.¹¹⁵²

The contradiction of (some) Private Sector Participation rules under GR-16 with the Jakarta Cooperation Agreement is because the rule was made and entered into force many years after the Cooperation Agreement was executed. Article 77 of GR-16 states that all previous agreements, contracts and licences entered into or issued before the entry into force of GR-16 prevails.¹¹⁵³ However, Article 76 of the GR-16 stipulates that an implementing regulation issued prior to GR-16 will prevail, only when it does not contradict GR-16 provisions.¹¹⁵⁴ This brings potential legal challenges to the validity of Regional By-law 13 which is used as a legal basis for PAM Jaya and the governor in signing the Cooperation Agreement.

Neither Article 76 nor 77 provides the solution to our previous question. Unless GR-16 is amended so that the applicability of GR-16 with respect to previous contracts becomes clear¹¹⁵⁵, the legal problems surrounding the legitimacy of the

¹¹⁵² The contract is applicable in regions which have already been served and not yet served by PAM Jaya when the contract is entered into

¹¹⁵³ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16), Article 77

¹¹⁵⁴ Ibid, Article 76

¹¹⁵⁵ The Water Law 7/2004 transitional provision at Article 98 also does not obligate licenses which were granted prior to the entry into force of the water law to be adjusted. See UU No. 7 Tahun 2004 (Water Resources Law) Article 8. According to Justice Maruarar Siahaan in his dissenting opinion: *“The transitional provision set forth in Article 98 of the a quo Law which does not regulate the adjustment to provisions of new Law, can be used as a justification for permits which had been granted prior to the application of Law Number 7 Year 2004, although it is highly contradictory to the new paradigm concerning the right to water as Human Rights..... Article 33 Paragraph (3) of the 1945 Constitution requires that the state’s control on water resources shall apply without waiting for the termination of the aforementioned permits. This is based on the logic that if the right to live, with respect to which water constitutes the requirement that cannot be delayed or decreased for any reason whatsoever, therefore Article 98 of the a quo Law without adjustment with new Law is clearly*

Cooperation Agreement's service area and the applicability of PSP rules under GR-16 will remain.

As will be discussed in the next sections, arriving from the contractual point of view, the private sector and the regulatory body also have the opinion that national laws such as the Water Law 7/2004 and GR-16 are inapplicable to the Jakarta concession. This prompts the question as to whether regulation by contract may impede sectoral reforms.

6.1.3.3. Ministry of Health

The Ministry of Health regulates drinking water through The Minister of Health Regulation 492 of 2010 (Permenkes 492), the attachment to which contains the detailed bacteriological, chemical and physical requirements of healthy drinking water.¹¹⁵⁶ The Permenkes 492 covers drinking water distributed through pipes, bottled water, water tanks and any water used for the production of food and beverages.¹¹⁵⁷

As previously noted, a ministerial regulation is not binding as 'laws and regulations' and considered only as some form of guideline. However, GR-16, at Article 6(1), requires that any distributed drinking water must "*comply with quality standards regulation issued by the ministry in charge of public health*". Furthermore, in GR-16, there is a general obligation for undertakers to comply with quality

contradictory to the 1945 Constitution." *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004* See Maruarar's dissenting opinion at page 69-70 of the official English Translation

¹¹⁵⁶ *Peraturan Menteri Kesehatan Republik Indonesia No. 492/Menkes/PER/IV/2010 Tahun 2010 Tentang Persyaratan Kualitas Air Minum*

¹¹⁵⁷ *Ibid* Article 2 (1)

standards¹¹⁵⁸ and to specify such quality standards in the contract between them and the customers¹¹⁵⁹.

With the referral from GR-16, the quality standards on Permenkes 907 becomes binding on all water undertakers, be that a government entity, state or regional-owned enterprise or the private sectors. More importantly, the requirement that the contract between the water undertaker and the consumer stipulates the drinking water quality standards derogates any private agreement between them.

6.1.3.4. Jakarta Water Sector Regulatory Body (JWSRB)

Following the 2001 contract renegotiation, the JWSRB was set up; its purpose is, among others, to mediate disputes between the concessionaires and PAM Jaya and to monitor the enforcement of contractual provisions. According to the Cooperation Agreement Clause 51, The JWSRB “*shall have the functions and powers set out in the Decree of Governor of DKI Jakarta Province as attached in Schedule 20, as may be amended in the future by a Regional Regulation of DKI Jakarta, including without limitation*” in (i) coordinating relevant governmental agencies in order to implement the Cooperation Agreement and; (ii) to monitor: the implementation of the contract, the services to customers, the closure of deep wells, tariff increases, subsidy programme, performance of PAM Jaya; (iii) developing dispute settlement mechanisms between concessionaires and customers and (iv) to mediate

¹¹⁵⁸ Ibid See also Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) at Article 68(2)a

¹¹⁵⁹ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) at Article 64(6)b

disagreement or dispute between the concessionaire and PAM Jaya, before referring such dispute to expert panel or arbitration.¹¹⁶⁰

Since clause 51 contains the phrase “*including without limitation*”, the clause could be interpreted to mean only to list down the features of regulatory powers that the JWSRB must have, but not in limiting it. Furthermore, the clause refers to a Governor’s Decree No. 95 Year 2001 attached in the contract schedule, “*as may be amended in the future by a Regional by law of DKI Jakarta*”.¹¹⁶¹ Future amendments may include broader regulatory powers, such as preventing the misuse of a dominant position, protecting consumer and community interest in terms of charges and service levels, ensure that customers benefit from improved efficiency as well as ensuring “the provision of an efficient and economically sustainable water supply”.¹¹⁶² This follows that the powers and functions of the JWSRB are stipulated in a Governor’s Decree enclosed as the contract’s schedule, and the provision regulating such powers and functions may be amended, but its amendment must be conducted through a regional by-law (‘Regional Regulation’ is the term used in the contract). At the time of writing, no Regional By-law stipulating those powers has been enacted.

Further complication arises, however, because Jakarta’s Governor’s Decree No. 95 Year 2001 on the formation of the Jakarta Water Services Regulatory Body has been revoked and replaced by Jakarta Governor Regulation 54 Year 2005

¹¹⁶⁰Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 51

¹¹⁶¹ *Keputusan Gubernur Propinsi DKI Jakarta Nomor 95 Tahun 2001 Tentang Pembentukan Badan Regulator Pelayanan Air Minum (Revoked-Ed)*

¹¹⁶²Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 51.2

concerning Drinking Water Regulatory Body.¹¹⁶³ The 2001 contract at Clause 51 requires that amendments affecting the power and function of the regulatory body be made through a regional by-law, which indeed constitutes a higher rule¹¹⁶⁴ compared to a Governor's decree or regulation as it requires the consent of Jakarta's regional parliament. From a contractual perspective then, Clause 51 of the Cooperation Agreement points to a non-existent rule (the revoked Governor's Decree 95/2001) and its replacement rule, Governor Regulation 54 Year 2005, is not valid since it is not a regional by-law. This situation challenges the validity of the JWSRB as a regulatory institution. This could mean that the JWSRB is actually operating without any regulatory mandate from the state and relies completely on the 2001 contract.

For some authors, such as Shugart and Balance, JWSRB may not even fit the conventional understanding of a 'regulator' as it does not have proper legal mandate and does not have the power to issue or enforce licences or exercise a meaningful discretion.¹¹⁶⁵ For other commentators however, JWSRB may be regarded as a "transitional" regulator which paves the way for a more independent body in the

¹¹⁶³ Replaced by Peraturan Gubernur No. 54 Tahun 2005 Tentang Badan Regulator Pelayanan Air Minum Article 18.2 and then replaced again by Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum

¹¹⁶⁴ Undang Undang No.10 Tahun 2004 Tentang Pembentukan Peraturan Perundang Undangan Article 7

¹¹⁶⁵ According to them, regulators should have these characteristics: (1) be established and given its mandate by law – not just by the terms of contract between the public authority and the company, (2) be a permanent body established for the entire course of the PSP, (3) exercise its authority by issuing, adjudicating and/or enforcing licences, (4) have discretionary power on public policy issues, and not merely monitoring or verifying compliance and (5) play no role in the selection of the personnel. See Shugart, C. and Balance, T., *Expert Panels: Regulating Water Companies in Developing Countries* (South Asia Forum for Infrastructure Regulation (SAFIR) 2005) <<http://www.safirasia.org/SafirPDF/rsrc403.pdf>> accessed January 6, 2012

future.¹¹⁶⁶ This understanding appears to fit with that of the Cooperation Agreement, since it stipulates that the JWSRB shall be accorded with more regulatory power in the future¹¹⁶⁷ (it does not say when), by way of regional legislation, for preventing the misuse of dominant position, protecting consumer interests and ensuring sustainability of water supplies.

6.1.3.5. Ministry of Environment/Bappedal

The Ministry of Environment (at central level) is responsible for licensing activities across the boundaries of provincial governments. This may include the licensing of water abstraction and sewage discharge activities across provincial boundaries. The Ministry also has residual enforcement power to take action against regional environmental problems if it considers that the regional government does not take the matter seriously.¹¹⁶⁸

Jakarta's Badan Pengendalian Dampak Lingkungan Daerah (Bappedalda Jakarta) is responsible for monitoring and enforcing environmental activities for the Jakarta region. This includes the licensing of abstraction and discharge activities by

¹¹⁶⁶ See Eberhard, 'Infrastructure regulation in developing countries: an exploration of hybrid and transitional models' Eberhard, A., *The Independence and Accountability of Africa's Infrastructure Regulators: Reassessing Regulatory Design and Performance* (South Africa: University of Cape Town 2006)

¹¹⁶⁷ The contract at Clause 51.2 stipulates that the parties intended that the JWSRB shall have the functions of preventing the misuse of dominant position, protecting consumer and community interest in terms of charges and service levels, ensure that customers benefit from improved efficiency as well as ensuring "the provision of an efficient and economically sustainable water supply". All of these functions have to be enabled by legislation. These have not materialised up to now. Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001

¹¹⁶⁸ Bedner, A., 'Consequences of Decentralization: Environmental Impact Assessment and Water Pollution Control in Indonesia' 32 Law & Policy 38

Palyja and Aetra and the supervision of Environmental Impact Assessments by the two companies.

6.1.4. General administrative and economic rules applicable to Jakarta water utilities

In addition to sectoral rules on water services above, the water businesses must also comply with general administrative and economic rules. The law on public services and the law on freedom of information are the two newly enacted legislations in administrative law spheres, relevant to water businesses. Unfortunately, because the law has been in force only recently, there is a lack of case law to be analysed.

The Public Service law¹¹⁶⁹ regulates public services delivery, both when they are delivered by the state or a state-owned enterprise, and when services are contracted out to the private sector. Ombudsman offices, at regional or central level, are tasked by the law to enforce against substandard delivery of public services. The ombudsman has the power to recommend to the government that certain government officials be replaced or fined, for failing to deliver services properly.

The Public Service law imposes some transparency requirements on private sector participation, such as the publication of key contractual terms and imposition of mandatory minimum standards of services in the contract with the private sector.¹¹⁷⁰ The applicability of the Public Service law to private sector participation is nevertheless a subject of debate. The enforcement reach of the ombudsman offices are

¹¹⁶⁹ Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik

¹¹⁷⁰ Ibid Article 13.b and its elucidation

limited to government officials and state employees, and certainly not private sector employees. As such, the current legal system needs to invent another accountability mechanism for private sector deliveries.

The law on “Openness and Freedom of Information” (the FoI Law) is also applicable to water businesses.¹¹⁷¹ The FoI Law has been enforced only recently in 2010 and the national FoI Commission has also been recently formed. As such, there is not much case law to be analysed. The applicability and operation of the FoI Law to water businesses will be presented in depth in section 6.6.

The Law on Competition and the Prohibition of Unfair Business Practices¹¹⁷² has been enforced for some years, through the arm of the Competition and Business Supervisory Commission, and cases related to water services have been dealt with under this law.

Table 9 Recapitulation of Primary Regulatory Institutions Overseeing Jakarta Water Businesses

Area	Institutions	Primary Legal Basis	Regulatory Product(s)
General policy/ direction	Department of Public Works	Law 7/2004 GR 16/2005	Non binding guidelines:

¹¹⁷¹ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik

¹¹⁷² Undang Undang No.5 Tahun 1999 Tentang Praktek Monopoli dan Persaingan Usaha Tidak Sehat

	The National Planning Agency		
	Ministry of Home Affairs (MOHA)	Law 32/2004	MOHA Rules 2/2007; 3/1998; 7/1998; MOHA Decree 50/1999
Financial management	Ministry of SOE	Law 1/2004 on State Budget Law 32/2004	Financial reporting guidelines Review of annual reports, corporate plans and business plans
	Jakarta Regional Government	Law 5/1962 Regional By-laws	By-law 13/1992, By-law 11/1993
	Ministry of Home Affairs	Law 32/2004	Guideline on PDAM's accounting system (MOHA Decree 18/2000)
Drinking Water	Ministry of Health	Law 7/2004 GR 16/2005	Drinking Water Quality Standard, The Minister of Health Regulation 492/2010 on Drinking Water Quality
	Jakarta Regional Government		
Pricing, Licensing	Jakarta Regional Government	Law on DKI Jakarta Law 7/2004 GR 16/2005 MOHA Decree on Tariff Setting Guidelines	Governor's Decree on Tariff Increase/PTO Operational licence

Monitoring of performance	Jakarta Water Sector Regulatory Body (JWSRB) PAM Jaya Jakarta Regional Government	Jakarta Governor's Decree Cooperation Agreement 2001	Guidelines None Governor's Decree
Environmental protection, waste water discharges	Ministry of Environment/ Bappedal Badan Pengendalian Dampak Lingkungan Daerah DKI		Some enforcement mechanism Discharge Licence
Consumer dispute	JWSRB (Mediation effort) The Court		Court's Decision
Freedom of Information	Regional Ombudsman Freedom of Information Commission	Freedom of Information Law 2009	Recommendation Regulation and Decision
Competition (Central Government Jurisdiction)	Komisi Pengawas Persaingan Usaha (KPPU)	Law No.5 Year 1999	Decision

6.2. Policy in involving the private sector

6.2.1. Regulation at the central and local level

When the Cooperation Agreement was entered into in 1997, Indonesia was a centralistic state and all decisions pertaining to regional matters – that includes water services in Jakarta and elsewhere – were determined by the central government. After Soeharto's downfall, the decentralisation programme started. The central government was only left responsible for dealing with several matters including: defence, monetary policies, diplomacy, the judiciary and matters concerning the recognition of religion.¹¹⁷³ Water services regulation is included as a part of governmental function decentralised to the regions. The regions then have full control in deciding the question of ownership and the regulatory models they wish to apply, subject to constraints provided by national legislations..

That being said, central government's policies and regulations still influence (or to some extent even constrain) the regional government's powers in determining ownership and regulatory models for water utilities. Except for regional by-laws, every legal product listed on **Table 9** in the previous section is a regulation enacted by the central government. It is a commonplace that inconsistencies between central and local regulations are found.

The decisions of the Indonesian Constitutional Court also shape policy making in this area. The Indonesian Water Resources Law No.7 Year 2004, which became the legal basis of water services regulation is – according to the Court – 'conditionally

¹¹⁷³ Indonesia, 'Undang Undang No.32 Tahun 2004 Tentang Pemerintahan Daerah'

constitutional'.¹¹⁷⁴ The practical implication of this is that the law could be revoked by the Constitutional Court in the future if its' implementing regulation or practices contradict the principles of the Court's decision in the Judicial Review. The Court's review does contain some prescription as to the model, operation and principles of water utilities regulation with which the regional governments must comply.¹¹⁷⁵

Law 7/2004 regulates drinking water only broadly. It obligates the governments, central, provincial or local depending on the competences, to be responsible for developing drinking water provision systems. GR-16 implements the decentralisation principle by directly obligating regions, both municipalities (city government) and regencies (rural government) to provide drinking water for the communities in their territory.¹¹⁷⁶ Such a duty is absent for the provincial and central government. The duties of the central (GR-16 Article 38) and provincial governments (GR-16 Article 39) are restricted to implementing policies and facilitating the provision of bulk water.

6.2.2. Ownership and regulatory model

Water Law 7/2004 does not specify what sort of ownership and regulatory model it envisages. However, it does appear to place a priority on public ownership as reflected in Article 40.¹¹⁷⁷ **In para.3**, article 40 states that "*State Owned Enterprises*

¹¹⁷⁴ See *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004*

¹¹⁷⁵ Al'Afghani, M.M., 'Constitutional Court's Review and the Future of Water Law in Indonesia' 2 Law, Environment and Development (LEAD) Journal (2006)

¹¹⁷⁶ See Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) Article 40 para.c

¹¹⁷⁷ Out of 100 Articles in Water Resources Law, only Article 40 is dedicated specifically to Drinking Water Provision. The reluctance to regulate is partially due to regional autonomy and the threat of

and Regional Owned Enterprise are the undertakers¹¹⁷⁸ of drinking water provision system”. In **para.4** of Article 40 it is stated that “Cooperatives, privately-owned business enterprises and the [members of the] society may participate in the undertaking of the development of drinking water provision system”.

The original Bahasa Indonesia of Article 40.4 of Law 7/2004 para.4 reads: “Koperasi, badan usaha swasta, dan masyarakat dapat berperan serta dalam penyelenggaraan pengembangan sistem penyediaan air minum”. Both of the underlined phrases relate to important concepts and as such must be carefully translated into English.

The underlined phrase, “Badan Usaha swasta” is commonly, loosely translated, into English as ‘the private sector’ while “Koperasi” is a direct equivalent to continental Europe’s “cooperatives”, a for-profit but *gemeinschaft* legal entity. The author considers the translation of “badan usaha swasta” into “private sector” as somewhat incomplete as the term ‘private sector’ embodies a wide array of non state actors such as corporations, NGOs, firms and foundations, including cooperatives.

invalidation from the Constitutional Court. See Al'Afghani, M.M., ‘Indonesia needs a strong water services law’ *The Jakarta Post* (Jakarta) <<http://www.thejakartapost.com/news/2009/08/31/indonesia-needs-a-strong-water-services-law.html>> accessed December 23, 2010 and recent OECD Report referring to this analysis at Ch.5.6. OECD, *OECD Investment Policy Reviews - INDONESIA* (2010) <http://www.oecd.org/document/26/0,3343,en_2649_34893_46225306_1_1_1_1,00.html> December 23, 2010

¹¹⁷⁸ The original Bahasa Indonesia of Article 40.3 of Law 7/2004 reads: “Badan usaha milik negara dan/atau badan usaha milik daerah merupakan penyelenggara pengembangan sistem penyediaan air minum”. The underlined phrase “merupakan penyelenggara” is the subject of the discussion here. Others have translated the underlined phrase as “will be the organizers of” and “shall carry out the development of..” (LEAD Translation). “Penyelenggara” is a noun, which can be translated into either Organizer or Undertaker, whereas, “merupakan” is a statement of being. The author regards that “are the undertakers of” is the closest expression in English that reflects the original Indonesian phrase.

The term “badan usaha” means “business enterprise”, while “swasta” means “private”. The author therefore chose to translate badan usaha swasta into “privately-owned business enterprises”.

Secondly, the term dapat berperan serta could also be problematic if translated improperly. Authors such as Butt and Lindsay translated the above phrase into “can play a role”¹¹⁷⁹, however, this appears to signify weaker meaning than its original Bahasa Indonesia phrase. The author believes that the proper translation is “may participate”, which is also used by the Constitutional Court’s English translation of the Judicial Review.

What differentiates Water Law Article 40 para.3 from para.4? Why distinguish the role of SOE or Regional-Owned SOE (para.3) from the other categories in para.4 such as the cooperatives, privately-owned business enterprises and the [members of the] ‘society’? Para 3 suggests that SOEs and regional SOEs **are** the water services undertakers. Does this mean that those in para.4 **are not** and cannot be the undertakers themselves, although they *may* ‘participate’ in the undertaking of water services?

This vagueness occurs due to strong disagreement over private sector participation during the drafting and enactment process of Water Law 7/2004.¹¹⁸⁰ In

¹¹⁷⁹ See Butt, S. and Lindsey, T., ‘Economic Reform when the Constitution Matters: Indonesia’s Constitutional Court and Article 33’ Vol. 44, No. 2 Bulletin of Indonesian Economic Studies. The official English translation of the Constitutional Court’s Judicial Review of the Water Law, however, used the term “may participate”. See *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/II/2004* at page 57.

¹¹⁸⁰ Al’Afghani, ‘Constitutional Court’s Review and the Future of Water Law in Indonesia’

order to avoid invalidation by the Constitutional Court, the drafters of Water Law 7/2004 choose a softer language as stipulated in Article 40.4. Comparing Article 40.4 of the Water Law 7/2004 with GR-16, one of the dissenting judges at the Constitutional Court's Judicial Review of the Water Law dubbed Article 40 para 4 as a "disguised privatisation" [italicised and underlined by author]:

*Article 40 Paragraph (3) of the Water Resources Law states that State-owned enterprises and/or regional government-owned companies shall be the administrators of the development of drinking water provision system. The role of cooperatives, private business entities and community in the development of Drinking Water Provision System is not to take over the responsibility of the Government/Regional Government through the State-Owned Enterprises/Regional Government-Owned Enterprises as stated in Elucidation of Article 40 paragraph (4). Therefore, Article 40 Paragraph (4) **constitutes a disguised privatisation** as indicated [by] Government Regulation No. 16 Year 2005 which is the implementation of Article 40 of the Water Resources Law.¹¹⁸¹*

Para.3 of Article 40 of the Water Law appears to imply that a water utility has to be in the legal form of a State or regional-owned enterprise, set up under the Law on SOE¹¹⁸² or the Law on Regional SOE¹¹⁸³, and not any other form of legal entities even when they are fully controlled by the government.¹¹⁸⁴ This, of course, does not deter the possibility for the shares of the SOE or regional SOE being transferred,

¹¹⁸¹ Dissenting opinion of Judge Mukhtie Fadjar, *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004* at p.58 of the English translation

¹¹⁸² Undang Undang No. 19 Tahun 2003 Tentang Badan Usaha Milik Negara

¹¹⁸³ Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah

¹¹⁸⁴ This is a rather elusive 'entrenchment' of public ownership if compared to Victoria (See section 4.2.1 above). The entrenchment in Victoria is more straightforward as it obligates that water services be delivered by a "Public Authority". Constitution Act 1975, No. 8750 of 1975, Version No. 196 s.97 (1) (2)

partially, to private entities. As long as their legal status remains an SOE or a regional SOE, it appears to be allowed by para.3.¹¹⁸⁵ Secondly, as full divestiture would change the legal status of SOEs into normal corporations, this would bar them from providing the service. Hence, para.3 also implies that full divestiture of all incumbent water utilities are prohibited.

This begs the question: given the omnipresence of SOEs and Regional SOEs, what role do the entities in para.4 play in ‘participating’ in the provision of drinking water services? Law 7/2004 is silent about this, but there are some clues in GR-16.

Article 64 (1) of GR-16 stipulates “*cooperatives and/or privately owned business enterprises may participate in the development of drinking water provision system in regions which are not yet covered by services provided by SOE or regional SOEs*”.¹¹⁸⁶ As discussed in the previous chapter, this paragraph causes confusion about whether private sector participation is allowed only for an entirely Greenfield project or also in regions where SOEs or Regional SOEs are already present, but have yet to achieve universal coverage. If the latter interpretation is taken, then GR-16 can be deemed to allow some sort of network unbundling.¹¹⁸⁷

The third paragraph of Article 64 of GR-16 stipulates that any involvement of the cooperatives or privately-owned business enterprises as mentioned above should be done through a proper procurement procedure, as stipulated under prevailing laws and regulations. The fifth paragraph of this article stipulates that following such

¹¹⁸⁵ UU No. 7 Tahun 2004 (Water Resources Law) Article 40

¹¹⁸⁶ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16)

¹¹⁸⁷ As explained above, the bulkwater provision is already unbundled. Such a phrase could mean that unbundling beyond bulkwater provision is also allowed, for example, in retail or treatment plants.

procurement, the cooperatives or privately-owned business enterprises shall enter into agreement with the government.

Under GR-16, such agreement between regional government and the provider shall contain, at least, provisions regulating (i) service coverage, (ii) technical standards (quality, quantity and water pressure), (iii) preliminary tariffs and tariff formula, (iv) contract period and (v) the rights and obligations of the parties.¹¹⁸⁸ When the contract period is over, it is required that all of the assets and equipment are transferred to the central or regional government in a functional condition.¹¹⁸⁹ With this clause, it becomes clearer that the government envisages an “x-operate-transfer” model of private sector participation in the water services sector.¹¹⁹⁰

As GR-16 only states that the involvement of the private sector should go through the “proper procurement procedure”¹¹⁹¹, the regime for PSP in water supply thus falls under the general procurement regime, albeit with some guidelines from sectoral rules, such as from the Minister of Public Works¹¹⁹² and BPP-SPAM. Article 65.6 of GR-16 requires further regulation to be enumerated through a ministerial regulation. Permen PU-18 elaborates technical guidelines, feasibility studies and a contractual model of PSP in more considerable detail. The technical guidelines were adopted from International Water Association (IWA) recommendations while the

¹¹⁸⁸ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) Article 64.6

¹¹⁸⁹ Ibid Article 64.7

¹¹⁹⁰ The “X” could mean “build” or “repair”

¹¹⁹¹ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) Article 64.5

¹¹⁹² Indonesia, *Peraturan Menteri Pekerjaan Umum No.18/PRT/M/2007 Tentang Penyelenggaraan Pengembangan Air Minum Sistem Penyediaan Air Minum* (2007)

procurement contract model appears to be adopted from an earlier version of a National Model of Procurement Document.

To conclude, Water Law 7/2004 and GR-16 are not direct with respect to the form of ownership and regulatory models that should be implemented in Indonesia, although, by analysis, they both appear to prefer a contractual model of private sector participation.¹¹⁹³ The rules does not stipulate what sort of PSP model is allowed, it only suggests that it must be in the form of a contract. Such contracts should be entered into with the government (municipal, provincial or central, depending on the case) and not with the PDAM. Such contracts should be awarded through sound public procurement procedure, in line with principles of public procurement found in prevailing laws and regulations. There are possibilities that this interpretation would be rejected by the Court should the Water Law be petitioned for another Judicial Review in the future.

This vague, inconsistent and half-hearted legal framework has resulted in an inherent lack of regulation of Indonesia's water services. To this extent, PSPs are governed primarily by contract without any "umbrella" regulation in control of such contracts. As will be demonstrated by the case of Jakarta's concession, reliance on contracts alone without sufficient umbrella regulation will have implications for the transparency of its services.

¹¹⁹³ Other models include: full divestiture or joint venture. Full divestiture is not possible as discussed above but joint venture is not highlighted by the rules. See Section 2.2 on models of PSP

6.3. The decision to procure

As a prerequisite of good governance, contractual models of water services as implemented in Victoria and Indonesia are usually preceded with a procurement. This is not the case with England which fully divested its water utilities. This section will analyse how procurement rules are applied to the water sector.

The Independent Expert on the Human Right to Water and Sanitation, in her 2010 report, highlighted the need to have a “*democratic, participatory and transparent process*” in the decision to delegate water services.¹¹⁹⁴ She added that one of the main prerequisites of genuine participation would be the “*disclosure of adequate and sufficient information and actual access to information, referring in particular to the instruments that delegate service provision*”.¹¹⁹⁵ In the context of Jakarta, this would be the disclosure of procurement plans and key procurement terms prior to the bidding process and selection of concessionaires.

When the Cooperation Agreement was signed in 1997, it was not subjected to any procurement rule. A simple procurement rule did exist at that time as a part of regulation implementing the state budget¹¹⁹⁶, but was circumvented. The decision to procure in Jakarta’s water services was made unilaterally by the Government through lobbies made by multinationals towards Soeharto’s son and cronies. The first rule

¹¹⁹⁴ de-Albuquerque, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, A/HRC/15/31

¹¹⁹⁵ Ibid

¹¹⁹⁶ Keputusan Presiden Nomor 11 Tahun 1973 tentang Pedoman pelaksanaan Anggaran Pendapatan dan Belanja Negara tahun 1973/1974 (Presidential Decree No. 11 Year 1973 on the Guidelines of Implementation of the 1973/1974 State Budget). This rule is not specifically dedicated to procurement but merely contains guidelines on how to spend state budget.

dedicated to public procurement was enacted in 2000 through a Presidential Decree¹¹⁹⁷ and has, ever since, been amended and reformed, through the help of international financial institutions.

Contracting out of water services by regional government or state and regional-owned enterprises is currently covered by Presidential Regulation 54 Year 2010 on Procurement of Goods and Services (PR-54).¹¹⁹⁸ The said procurement rule will be applicable if the contract ends and the Jakarta Government decides to continue inviting the private sector to participate. PR-54 is applicable to any circumstances except in the event of emergency. PR 54/2010 requires that governmental institutions (budget users – see the next section for definition) formulate a yearly procurement plan.¹¹⁹⁹ PR-54 requires that an abridged form of procurement plan, consisting of at least information concerning the names and address of the budget user, the work package to be carried out, the location of such work and an estimate of the total cost of such a project, be announced to the community on its website and/or official procurement board.¹²⁰⁰

Had similar provisions been applied to the Jakarta Concession, the process would have been more transparent as the government could have opened up more opportunities for the private sector to participate.

¹¹⁹⁷ Keputusan Presiden No. 18 Tahun 2000 tentang Pengadaan Barang/Jasa Instansi Pemerintah

¹¹⁹⁸ Peraturan Presiden No.54 Tahun 2010 Tentang Pengadaan Barang/Jasa Pemerintah The procurement rule is applicable to State- and Regional-Owned Enterprises, see Article 2.b.

¹¹⁹⁹ Ibid Art 22.3.(c)

¹²⁰⁰ Ibid Art 25.2 and 3

6.3.1. Committees/Task Force

The procurement system under PR-54 is a decentralised one. Unlike Victoria, Indonesia recognises no single procurement office. PR-54 thus organises procurement through several public offices: the budget user or its proxy, commitment-making official, procurement unit/procurement official, project-beneficiary official and the internal supervisory unit. Most of these offices are held on an ex-officio basis. These forms of organisation apply to central and regional governments equally.

A budget user is the official authorised to use the budget. He is tasked with formulating the general plan for procurement; announcing publicly the general plan of procurement on the website; appointing the commitment-making official, procurement official and project beneficiary official; selecting the winning bidder; supervising implementation of the budget plan and record keeping of procurement documents; including mediating disputes between commitment-making official and procurement unit/procurement official.¹²⁰¹ In a regional government, budget users are usually appointed by the head of regional government (a Mayor or Governor). With such a structure, the Mayor or Governor is the highest line of accountability in the procurement process of a regional government.

The commitment-making officials are tasked with specifying the details of the procurement plan: technical specification of goods and services to be procured, drafting self-estimated price and drafting the initial version of the contract. The commitment-making official is also tasked with issuing the letter of appointment for

¹²⁰¹ Ibid Art 8 A budget user can delegate its responsibilities to a proxy. See Art 1 (6)

the winning bidder (however, it is the budget user that selects the winning bid, the commitment-making official only issues the letter), signing the contract, executing the contract, reporting the results of the procurement to the budget user or his proxy, performing the contract, transferring the procurement results to the budget user or his proxy, reporting the project progress trimonthly and preserving all procurement documentations.¹²⁰² PR-54 stipulates the prerequisites to be appointed as a commitment-making official: they ought to have integrity, discipline, responsibility and possess technical and managerial qualifications to perform the task, never have been involved in any collusion, nepotism and corruption practices, sign the integrity pact and be certified in procurement skills.¹²⁰³

Procurement units must be formed by government institutions, and procurement through such units is obligatory for goods above IDR 100 million or services above IDR 50 million.¹²⁰⁴ The unit shall consist of working groups, each comprising of at least three persons and could be more depending on the complexity of the task. The working group can be assisted by an expert whose task is in giving explanations of technical terms, in case a contestation is raised by a bidder.¹²⁰⁵ Members of the procurement unit should understand the purpose of the procurement and its specific role in the procurement process. They must also have comprehension of the content of the document, methods and procedure of the procurement. They must

¹²⁰² Ibid Art 11

¹²⁰³ Ibid Art 12

¹²⁰⁴ Ibid Art 17.g. For goods procurement with amounts lower than IDR 100 million or lower than IDR 50 millions for services, it needs only to go through the 'procurement official'. This type of procurement has a more or less similar procedure but is not discussed in depth as the value of contracting out in water services is envisaged to be a lot more than this.

¹²⁰⁵ Ibid Art 14

have expertise in procurement and sign the integrity pact. The procurement unit is tasked with drafting the plan for selecting the service provider, enacting procurement documents, determining the amount of guarantee, announcing the commencement of procurement on its websites and the national procurement portal, evaluating the qualification of service providers through pre-qualification or post-qualification procedure, and conducting technical, administrative and price evaluation against incoming offers. The procurement unit must also respond to contestation.¹²⁰⁶

Conflict of interest (CoI) is regulated under PR-54 and encompasses both CoI among the members of the procurement unit and the official appointing them and CoI which arises due to the position of a supplier as a planner and supervisor on the same project. For the first category, PR-54 stipulates that members of a procurement unit shall not have any family relationship with the official who appointed them as a member of the unit.¹²⁰⁷ For the second category, the PR-54 forbids a supplier to participate in procurement if it had previously been appointed as either supplier or planner in such a project.¹²⁰⁸ As regards CoI between procurement unit and suppliers, PR-54 stipulates that all parties involved in the procurement should “*avoid and prevent conflict of interest*”¹²⁰⁹ and that they should avoid and prevent abuse of authority and collusion which leads to the detriment of state finances. Elucidation of the PR-54 further clarifies that conflict of interest under the above provision means that parties involved in procurement shall not lead a double role (for example, on the one hand being a director at the supplying company and on the other hand acting as a

¹²⁰⁶ Ibid

¹²⁰⁷ Peraturan Presiden No.54 Tahun 2010 Tentang Pengadaan Barang/Jasa Pemerintah Art 17

¹²⁰⁸ Ibid Article 19 (4)

¹²⁰⁹ Ibid Article 6(e) regarding “Procurement Ethics”.

member of the procurement committee) or ‘affiliation’, which may arise out of marriage or familial relation, or is in control of or managing (directly or indirectly) the supplier company or through controlling shareholding (defined as more than 50%).¹²¹⁰

6.3.2. Tendering Process

6.3.2.1. Expression of Interest

Many authorities consider the announcement of tender from the authorities to be the pinnacle of transparency in procurement. For example, the Independent Expert on the Human Rights to Water concludes that “*the subsequent process of tendering, bidding and contract negotiation also must be transparent*”.¹²¹¹ Bovis considers that the transparency of the contracting authority’s determination to procure will trigger competition as it will be reflected in prices presented by the the bidders to the authority.¹²¹² Meanwhile, the EC Public Works Directive utilises “contract notices” and requires the publication thereof in order to guarantee competition.¹²¹³

¹²¹⁰ Ibid Elucidation of PR-54/2010, Article 6 (e). A person who becomes a director and/or commissioner and companies which are involved in the same procurement is also considered to lead a “double role”. See Para B

¹²¹¹ de-Albuquerque, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, A/HRC/15/31

¹²¹² Bovis, C., *EC public procurement: case law and regulation* (Oxford University Press 2006) at p.153

¹²¹³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts O.J. L. 134, 30.4.2004, p. 114–240 in particular see Preamble, para. 36: “*To ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto.*”

Under PR-54, announcement of procurement through the procuring institution's website, official announcement board and the national procurement portal is obligatory for all modes of procurements: tender¹²¹⁴, simple tender¹²¹⁵, direct appointment¹²¹⁶, public selection¹²¹⁷ and simple selection¹²¹⁸, the purpose of which is to allow those with corresponding qualifications to apply. This announcement must be done after the institution's budget plan is approved by the Ministry of Finance or its "*Daftar Isian Pelaksanaan Anggaran*" (Budget Implementation Form) is approved by the regional parliament.¹²¹⁹ In the case where such form has not been approved but its budget plan has been approved, then the procuring agency needs to state such a condition on its announcement. For limited tenders, the names of the bidder must be announced.¹²²⁰ Announcements through daily newspapers are allowed for limited tender, but such newspapers must have a wide circulation.

PR-54 divides assessment methods into the pre-qualification and post-qualification assessments. Procuring agencies may select both or either one of these methods. Except for direct appointment¹²²¹, the pre-qualification method is commenced before proposals are submitted by the providers¹²²² with an aim of

¹²¹⁴ Peraturan Presiden No.54 Tahun 2010 Tentang Pengadaan Barang/Jasa Pemerintah Art 36.3

¹²¹⁵ Ibid Art 37.3

¹²¹⁶ Ibid

¹²¹⁷ Ibid Art 42.2

¹²¹⁸ Ibid Art 43

¹²¹⁹ Ibid Art 73.1 and 2

¹²²⁰ Ibid Art 74

¹²²¹ Ibid Art 56.5

¹²²² Ibid Art 56.3

providing a list of providers or a shortlist of contestants.¹²²³ Submitted documents must be evaluated within two working days after submission.

Within 28 days¹²²⁴ before the deadline for the lodging of the offer proposal (which will be discussed in the next sub section), the commitment-making official must have determined the self-estimated price (or otherwise known as Owner's Price/OP) of the procured goods or services which total value should then be announced by the the procurement unit.¹²²⁵

6.3.2.2. Request for Proposal

Unlike the common law legal system of procurement, the Indonesian procurement does not recognise offer and acceptance phases forming the basis of the contract.¹²²⁶ Hence, there is no exact RFP stage which can be interpreted as a form of 'offer' from the government to the providers. What is presented instead is a stage called "*Pemasukan Dokumen Penawaran*" or *lodging of offer proposal* by the providers to the procurement unit. PR-54 determines that the provider may alter the offer proposal before the deadline of submission.¹²²⁷ The offer proposal consists of technical specification and price, responding to the government's announcement on expression of interest or prequalification¹²²⁸ assessments (where applicable). The

¹²²³ Ibid Art 56.6

¹²²⁴ Ibid Art 66.4

¹²²⁵ Ibid Art 66.2

¹²²⁶ Art 1338 of the Civil Code simply stipulates that a contract is formed based on consensualism

¹²²⁷ Peraturan Presiden No.54 Tahun 2010 Tentang Pengadaan Barang/Jasa Pemerintah Art 78.3

¹²²⁸ When prequalification is taken as the method of procurement, the National Procurement Model Document requires that information concerning " *qualification assessment and proposed pre-qualified bidder(s) shall not be disclosed to the applicants of the prequalification or other parties, which do not*

lodging method could be performed using a one folder, two folder or two stage method, depending on the type of the project¹²²⁹

All offer proposals will then be evaluated by the procurement unit using one of several possible methods outlined by PR-54. The PR differentiates assessment method for procurement of goods¹²³⁰ from that of consultancy services.¹²³¹ Each of these methods should be employed to respond to specific project situations.

6.3.2.3. Selection of preferred bidder

Result of the selection of preferred bidder should be announced through the agency's website and official announcement board.¹²³² Tender participants may contest this decision when they find (i) violation of procurement procedure as stipulated in PR-54, (ii) conspiracy leading to unfair competition, (iii) abuse of authority by procurement unit or other officials.¹²³³ This complaint must be made in writing and can be drafted jointly with other bidders.¹²³⁴ Such a letter must be directed to the procurement unit and its copies directed to the commitment-making official and budget user or its proxy within five days after announcement of the winning bid is

relate to the process of prequalification". See Center for Public Procurement Policy Development, *Model National Procurement Document* (2007) , Chapter II. Instruction to Prequalification Applicants (ITPA), para 17.1

¹²²⁹ Peraturan Presiden No.54 Tahun 2010 Tentang Pengadaan Barang/Jasa Pemerintah Art 47

¹²³⁰ Ibid Art 48

¹²³¹ Ibid Art 49

¹²³² Ibid Art 80

¹²³³ Ibid Art 81

¹²³⁴ Ibid Art 81.1

made.¹²³⁵ The procurement unit must provide a written response against all points of claim within five working days after the letter is accepted.¹²³⁶

If the bidders found that the response from the procurement unit is not satisfactory, it may lodge an appeal. Such an appeal is directly addressed to the Minister or Head of Regional Government, depending on the case, within five days after the response of contestation is received.¹²³⁷ The appellant bidder must provide a guarantee in the amount of 2/1000 of the total owner's price estimate (OP) or a maximum of IDR 50 million.¹²³⁸ This appeal ultimately freezes the whole procurement process.¹²³⁹ The Minister or Head of Regional Government, depending on the case, shall provide a response to the appeal within 15 working days after the appeal letter was received.¹²⁴⁰ If the Minister/Head of Regional Government declares the appeal to be correct, then it shall order the procurement unit to conduct a re-evaluation or restart the whole process from the beginning and the guarantee payment shall be refunded to the appellant.¹²⁴¹ If the response is the reverse, then the Minister/Head of Regional Government shall order the procurement process to continue and the guarantee payment is kept with the treasurer.¹²⁴²

Lastly, the national model of procurement document requires that information on the process, evaluation of bids and recommendation leading to the determination of

¹²³⁵ Ibid Art 81.2.

¹²³⁶ Ibid Art 81.3

¹²³⁷ Ibid Art 82.1

¹²³⁸ Ibid Art 82.3

¹²³⁹ Ibid Art 82.4

¹²⁴⁰ Ibid Art 82.6

¹²⁴¹ Ibid Art 82.7,8,9,10

¹²⁴² Ibid Art 82.7,8,9,10

the winner as summarised on the Bid Evaluation Report and shall not be disclosed to the bidders or any other party until the contract is signed.¹²⁴³

6.3.2.4. Execution of the contract

The final version of the draft contract must be reviewed by the commitment-making official before being signed.¹²⁴⁴ PR-54 also imposes a performance guarantee for contracts worth more than IDR 100 million, in the amount of 5% of the total contract value or the OP value, depending on the final pricing of the bid.¹²⁴⁵ Such guarantee must be paid in full after the appointment letter from the commitment-making official is obtained and before the contract is signed.¹²⁴⁶

Signing is only possible after budget form is approved by the House and within 14 days after the appointment letter is signed by the commitment-making official.¹²⁴⁷ Legal advice from an advocate is required for contracts worth more than IDR 100 billion.¹²⁴⁸ The PR-54 requires that the counterpart is represented by its directors, as evident by its Articles of Association, although other parties may sign the contract as long as a proper power of attorney from the director is presented.¹²⁴⁹

The commitment-making official may unilaterally terminate the contract if the late performance fee has reached 5% of the total contract value, non-performance or

¹²⁴³ Center for Public Procurement Policy Development, *Model National Procurement Document* Procurement of Works with Qualification, Chapter II: Instruction to Bidders, para 27.1

¹²⁴⁴ Peraturan Presiden No.54 Tahun 2010 Tentang Pengadaan Barang/Jasa Pemerintah Art 86.1

¹²⁴⁵ Ibid Art 70.1 and 4

¹²⁴⁶ Ibid Art 70.3

¹²⁴⁷ Ibid Art 86.3

¹²⁴⁸ Ibid Art 86.4

¹²⁴⁹ Ibid Art 56.5 and 6

improper performance by the provider which is not fixed on due time, or if the provider has been proven to be involved in corruption, collusion as determined by the *authorities*, and if there are claims of procedural failures, claims of corruption, collusion and nepotism and violation of healthy competition in procurement as confirmed by the *authorities*¹²⁵⁰. In those events, the performance guarantee will be liquidated and the provider will be put on the government's 'blacklist'.¹²⁵¹

6.3.3. Publication of contracts

None of the articles in PR-54 regulate the publication of contract. The law on Public Service¹²⁵² and the Law on Freedom of Information¹²⁵³, which are higher forms of rule than the PR-54, both require that contracts are published by government agencies. However, PR-54 does not refer to the requirement of contract publication under both laws, although it was enacted after both laws were approved by the House of Representative. The only law that was referred to by PR-54 is the law on state budget 1/2004.

The Independent Expert in its report noted that it is crucial that “*The terms of reference and the final contract should be made available for public scrutiny and commenting. Commercial confidentiality must not jeopardize the transparency requirements provided for under the human rights framework*”.¹²⁵⁴ It is an extreme

¹²⁵⁰ The *authorities* here could mean anything from competition commission to the police and the court. Elucidation of Article 93 of the PR-54 is silent on this matter

¹²⁵¹ Peraturan Presiden No.54 Tahun 2010 Tentang Pengadaan Barang/Jasa Pemerintah Art 93.2

¹²⁵² Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik Article 13 (1) (b), (d) and (e)

¹²⁵³ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 11.1 (e)

¹²⁵⁴ de-Albuquerque, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, A/HRC/15/31

omission that PR-54 did not refer to the Freedom of Information and Public Service Law, especially with respect to the requirement to publish contract. Procurement should have served the public service value of transparency and not simply be a method by which the government may obtain value-for-money in its purchasings. In fact, the national model of procurement documents which were developed with the help of the Asian Development Bank imposes confidentiality requirements on the providers.

According to the standard model procurement contract, Clause 3.2:¹²⁵⁵

The Contractor, Subcontractor (if any) and Personnel without prior written approval from the CO, shall be forbidden during the Contract Period and for a certain period of time afterward as determined in the SCC, to:

(a) use the Contract Document or any other document/information produced by the contractor work for purposes other than for the execution of this Contract;

(b) disclose the above said documents/information to any third party.

In the above standard clause, disclosure by the provider would be prohibited unless approved by the commitment-making official (CO), who is the principal or owner/user of project.¹²⁵⁶

¹²⁵⁵ Center for Public Procurement Policy Development, *Model National Procurement Document* Procurement of Works with Prequalification, General Conditions of Contract, clause 3.2 . Similar terms apply to other types of procurement: services, consultancies and goods. This confidentiality may be extended after the contract period has ended. See “Special Conditions of Contract” on each model

Under the national model of procurement, the provider's employees and personnel are also required to exercise confidentiality. Clause 4.4 reads:

*With reference to Clause 3.2 GCC, all personnel are required to maintain confidentiality regarding their work. If required by the CO, the personnel may at any time be required to take an oath of confidentiality.*¹²⁵⁷

The national model of procurement does not impose corresponding obligations of confidentiality on the authorities.¹²⁵⁸ This provides latitude of discretion for the authorities to disclose information. However, other contracting parties are bound to the confidentiality provision. In several instances, it is the public authority and not the provider who objects to the disclosure of contracts and other information.

Confidentiality at the prequalification stage and during the bidding process and evaluation has a purpose to stimulate competition among the tenderers. After the winner has been determined, however, there is no compelling justification to prevent information about the winning bid, including its contractual arrangements, from being disclosed.

Finally, the existence of a confidentiality clause in the contract shall not prevent the operation of other laws, such as the freedom of information and public service laws, which mandates the disclosure of contracts between a Public Body and a third party. The Victorian procurement policy allows confidentiality clauses to be used, but requires such clauses to be complemented with another clause that will

¹²⁵⁶ Ibid Procurement of Works with Prequalification, General Conditions of Contract, clause 1.22

¹²⁵⁷ Ibid Procurement of Works with Prequalification, General Conditions of Contract, clause 4.4

¹²⁵⁸ Ibid

exempt the applicability of the confidentiality provision in the event of a Freedom of Information request. The purpose of this design is to avoid the authority from being held liable in disclosing information supplied by provider (See sections 4.2.2 and 4.2.3 above).

Indeed, the obligation of confidentiality on the existing Model of National Procurement Document is directed solely towards the provider and not the authorities. This is somewhat an improvement when compared to previous contracts which put the confidence obligation equally between providers and the authorities, such as Jakarta's Cooperation Agreement. But there can be occasions where such providers are also a Public Body under the Indonesian Freedom of Information Law which subjects them to some transparency rules, including disclosure of contracts and responding to a freedom of information request as they are entities entrusted with governmental functions. Without an exemption clause on their contract, they are bound to confidentiality duty towards the authorities and can be held liable for its breach.

6.4. Regulatory Decision making

6.4.1. Licences

The only type of licences enumerated in the Water Law and GR-16 are (i) “operational” licences for internal use, (ii) “licences” for other uses and (iii) environmental licences in the form of abstraction and discharge licences. Other than licences issued under sectoral water rules, industry regulation and the Company

Law¹²⁵⁹ require the companies and cooperatives to obtain commercial licences¹²⁶⁰ from the ministry of trade.

Companies, cooperatives or communities may undertake their own water supply system for internal use insofar as they are permitted to do so by the regional government. The procedure to obtain such permission is, however, unclear.

Article 65 of GR-16 reads:

***Para.3** : “Provisions [of water service] by the cooperatives and privately-owned business enterprises [in order to fulfill their own needs] must be conducted based on licence issued by the government or regional government in accordance with its authority under prevailing laws and regulations”.*

This is further reiterated in Article 40 which stipulates that regional governments “issue licenses for drinking water provisions system in its regions”.¹²⁶¹ In para.5 of Article 65, the GR-16 only stipulates that the guidelines and procedures of licensing will be regulated by a Ministerial Regulation.

Article 75 of GR-16, which regulates administrative penalties stipulates:

***Para.1**: “Privately-owned business enterprises and cooperatives who violate the terms of [...], including Article 65(3)... are subjected to sanction in the form of written warning”*

¹²⁵⁹ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas

¹²⁶⁰ Undang Undang No. 3 Tahun 1982 Tentang Wajib Daftar Perusahaan Article 11

¹²⁶¹ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16), Art 40.k The elucidation of this article only stipulates that licences shall be issued in accordance with prevailing laws and regulations. This is the only part of ibid elucidation which contain the word ‘licence’. Others are silent about it.

Para.2: “Privately-owned business enterprises, cooperatives and community members who, after three warnings as mentioned in the previous article were issued, fail to comply and repair its services then its commercial licence would be revoked”.

The logic of Articles 65 and 75 combined would be as follows: if an entity fails to obtain a licence (for internal provision of water supply as stipulated under Article 65.3) then, its licence would be revoked (Article 75 para 2). The only problem with this interpretation is that it is not backed by clarification on the types of licences. Article 65.3 talks about licences issued by the government or regional government but the mechanism for applying such licences is not really clear. Article 75.2 suggests that the failure to obtain the ‘licence’ in Article 65.3 will lead to the revocation of the entity’s commercial licence. It is possible that this article is meant to refer to general operational licences issued by the Ministry of Trade and Industry which is regulated by another law. Unless this is clarified, however, this is only a matter of interpretation.

Although article 65.5 of GR-16 requires further regulation to be enumerated through a ministerial regulation, the implementing regulation of GR-16, the Minister of Public Works Regulation No.18/PRT/M/2007 on Drinking Water Provision (Permen PU-18), does not elaborate the procedure of licensing.

Two lessons on transparency can be learned from this bad practice of legal drafting.¹²⁶²: First, if GR-16 Article 75.2 meant to refer to another law regulating

¹²⁶² See the definition provided by Mock in section 2.1.5: Regulation is transparent “*If someone subject to the law can understand what is expected of her, can understand and comply with the commands of the law, and can foresee the consequences of compliance or noncompliance*”. Mock, ‘An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development’. Compare also with the licensing regimes in Victoria (section 4.3.1) and England (section 5.3.1)

commercial licence, then it should explicitly refer to it. Second, the type and mechanism for the private sector to apply and obtain the ‘licence’ in Article 65.3 should have been clearly defined. There should be a clear procedure on how the licence could be applied, what the prerequisites are for obtaining them, what the licence conditions are, on what terms they can be revoked, suspended or modified and the maximum administrative cost for the licence application. Without these elements being properly defined, it will only create incentive for arbitrary interpretation by the officials which will eventually foster corruption and increase public spending due to court proceedings.

6.4.2. Is the Jakarta Water Cooperation Agreement a *concession* (*konsesi*)?

For some authors, a *concession* [the italicized word is to denote the term in its legal¹²⁶³ sense] is a combination of licences, permits and dispensations followed by a set limited ‘governmental authority’ to the concessionaire.¹²⁶⁴ Earlier Indonesian administrative law writers such as Prajudi had already warned that *concession* is

¹²⁶³ In its casual sense, a concession (along with affermage, management contract, etc) is often describe as “models” of private sector participation in infrastructure services. The emphasis is on the business model. Concession, the World Bank said, “...gives a private operator responsibility not only for the operation and maintenance of assets but also for financing and managing investment. Asset ownership typically rests with the government from a legal perspective, however, and rights to all the assets, including those created by the operator, typically revert to the government when the arrangement ends—often after 25 or 30 years.” See Public-Private Infrastructure Advisory Facility, *Approaches to private participation in water services : a toolkit* p. 10 What is rarely discussed by the World Bank is that *concession* is a **legal term** which denotes also an institutional arrangement which might be different from one continental country to another. The term *concession* in Indonesian Administrative Law is broader than the casual term used by the World Bank, because it involves a ‘delegation’ of governmental powers. See also section 2.2 on types of PSP including concession.

¹²⁶⁴ Atmosudirdjo, P., *Hukum administrasi negara* (Ghalia Indonesia 1981) at p.98-99 See also Pudyatmoko, Y.S., *Perizinan: Problem dan Upaya Pembinaan* (Grasindo 2009) quoting Prajudi, at p. 10

vulnerable to legal abuse.¹²⁶⁵ Prajudi gave examples where concessionaires could be given governmental authority, which may even enable them to relocate villages [presumably depending on the terms of the *concession*], including, to operate an airstrip, form an internal security unit and develop networked infrastructure such as roads, electricity and telephone lines.¹²⁶⁶ This, Prajudi said, could eventually cause socio-political problems. As such, *concession* contracts require a thorough due diligence and investigation towards the company's bona fides, not only in terms of its financial, but also political and moral reputation.¹²⁶⁷

Syarifudin¹²⁶⁸ considers that the undertaking delegated to the private sector in *concession* contracts is essentially a governmental duty. One of the consequences of a *concession* contract is, therefore, that the concessionaire could be considered as a public official acting on governmental duties.¹²⁶⁹ However, contemporary author Simatupang is of the opinion that the Jakarta Cooperation Agreement is not a 'decision' reviewable by the Administrative Court.¹²⁷⁰

There is another type of contract entered into by the government with the private sector which is not considered to be a form of *concession*, as it is not perceived to be exercising a governmental function. These are the ordinary types of contracts

¹²⁶⁵ Atmosudirdjo, *Hukum administrasi negara* at p.98-99

¹²⁶⁶ Ibid at p.98-99

¹²⁶⁷ Ibid at p 98

¹²⁶⁸ Syafrudin, "Perizinan Untuk Berbagai Kegiatan", unpublished paper, as quoted by Pudyatmoko in Pudyatmoko, *Perizinan: Problem dan Upaya Pembenahan*

¹²⁶⁹ Marbun, S.F., *Peradilan administrasi negara dan upaya administratif di Indonesia* (UII Press 2003) p.60

¹²⁷⁰ Simatupang, D.P., *Jawaban Tentang Konsesi* (Email Correspondence 2011)

entered into by authorities in the course of its daily functions. Hadjon¹²⁷¹ et al stated that governmental authority as a legal person may enter into agreements with other legal persons or natural persons, be that in the form of sale and purchase, lease agreement, work services or it can even bequeath its property. These types of contracts are not subject to public law, although the mechanism in which they are entered into may be constrained by public law regulating the use of state budget or assets.¹²⁷² Although such contracts can be preceded by administrative decision, the Law on Administrative Court stipulates that such an agreement (and the initial decision to contract-out) does not fall under its jurisdiction.¹²⁷³

Meanwhile, Simatupang is of the opinion that despite the delegation of powers from the government to the private sector in Jakarta (for example, the power to disconnect from network), the contract remains an ordinary private contract not reviewable by the Administrative Court and the decision made by the concessionaire remains a private decision.¹²⁷⁴

The categorisation of types of contracts will have implications for transparency. If a contract is considered a *concession* (in the ‘legal’ sense of the term),

¹²⁷¹ Hadjon, P.M. and others, *Pengantar Hukum Administrasi Indonesia (Introduction to Indonesian Administrative Law)* (Gadjah Mada University Press 1993) p. 166-167

¹²⁷² *ibid* p. 166-167

¹²⁷³ Undang Undang No. 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara Article 2.b. This article precludes “civil acts” but the elucidation refers to ordinary sale and purchase agreements containing no delegation of public services.

¹²⁷⁴ Simatupang, *Jawaban Tentang Konsesi*. However, in several cases involving fines imposed by the State Electricity Company to its customers, the Supreme Court ruled that despite the fact that the contract signed between the Company and its customers are standard private contracts, the imposition of fines is subject to the Court’s jurisdiction as the power to impose fines has its source in Government Regulations. See Bedner, A., *Administrative courts in Indonesia: a socio-legal study* (Martinus Nijhoff Publishers 2001) p.69

doctrinally, the contract is then a form of licence and the concessionaire is in exercise of a public function and can even be considered as a public official whose decision – by way of delegation from the government– is regarded as an administrative decision. By implication, such a contract will be considered a public document and should, therefore, be disclosed to the public. If, on the other hand, the contract is regarded as an ordinary contract entered into by the government in the course of its daily function, it falls entirely under private law and does not fall under the competence of the Administrative Court. The rules on public procurement carry no effect as to the form of the contract. Both concession contracts and ordinary contracts can be generated through public procurement.

Is the Jakarta water cooperation agreement between PAM Jaya and Palyja and between PAM Jaya and Aetra a *concession* contract or an ordinary private contract? Although the agreement has been referred to in literatures¹²⁷⁵ and the media as the “Jakarta Concession”, the official title of the agreement between PAM Jaya and Palyja/Aetra is actually the “Cooperation Agreement” (*Perjanjian Kerja Sama*). This is because the term used in the PAM Jaya statute¹²⁷⁶ which regulates and grants

¹²⁷⁵ For example in Braadbaart, . 'Privatizing water. The Jakarta concession and the limits of contract' A World of Water. Rain, Rivers and Seas in Southeast Asian Histories 297 also Jensen, O., ‘Troubled Partnerships: Problems and Coping Strategies in Jakarta’s Water Concessions’ (4th Conference on Applied Infrastructure Research

) <http://www.infraday.tu-berlin.de/fileadmin/documents/infraday/2005/papers/jensen_Troubled_Partnerships_Problems.pdf>

February 11, 2011 , even the regulator’s whitebook: Lanti, A. and others, *The First Ten Years of Implementation of the Jakarta Water Supply 25-Year Concession Agreement (1998-2008)* (Jakarta Water Supply Regulatory Body (JWSRB) 2009) , also Lanti, ‘A regulatory approach to the Jakarta Water Supply concession contracts’

¹²⁷⁶ By Law 13/92 Article 45

capacity to its directors to engage with third parties is through the mechanism of a “Cooperation Agreement”.

The content of the ‘Cooperation Agreement’, however, enabled Palyja and Aetra to enter into legal relationships with the customer “*acting both in its own right and for and on behalf of [Pam Jaya]*”¹²⁷⁷, and required that such customer contracts be adjusted in accordance with the Cooperation Agreement and allowed the disconnection of the flow of water to customer on behalf of PAM Jaya,¹²⁷⁸ including acting in emergency situations¹²⁷⁹ which may entail disruption of water services. Given such powers provided to the private providers, the argument that the contracts between PAM Jaya and Palyja and Aetra are a *concession* by nature is appealing.¹²⁸⁰

Success of a *concession* depends on institutional capacity, especially a well-developed body of jurisprudence on *concession* problems and the role of the administrative court in performing legal evaluation to the concession project¹²⁸¹ and in protecting and defending the public interest. What is absent in Indonesia is a well-developed jurisprudence on *concession* (and on other administrative law contracts!)

¹²⁷⁷ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 19.8

¹²⁷⁸ Ibid Clause 28.5.c

¹²⁷⁹ Ibid Clause 36.2

¹²⁸⁰ Management of public service under French Law can be carried out through rentals (*l'affermage*), public management contracts (*la gérance*), direct state control (*la régie*), or *concession*. Hurstel, D. and Pecquet-Carpenter, M., ‘Public Interest and Private Management: Incompatible Partners?’ in S. Cotter and D. Campbell (eds), *Comparative Law Yearbook of International Business 1995* (Kluwer Law Intl 1995). According to Llorens, *concession under French law contains six elements: The purpose of the public service covered under the contract; The delegation of the public service to a co-contracting party; The means of remuneration of the concession holder; The responsibility of initial investment costs; and The duration of the contract.* See Francois Llorens, *The Current Definition of Public Service Concession in Internal Law*, Strasbourg Law School, as quoted by Hurstel and Pecquet-Carpenter above.

¹²⁸¹ Ibid

and the limited role of the administrative court which, unlike the French Conseil d'Etat, cannot function as 'quasi-regulator' or 'super-regulator'.¹²⁸² The Conseil d'Etat can perform regulatory functions such as resolving consumer contracts or even modifying contractual terms¹²⁸³ but Indonesian Administrative Courts are constrained from doing so.¹²⁸⁴ If a claim is proven, the judgment can only contain one of the following obligations: "*rescission of the litigated administrative decision, the issuance of an administrative decision in case of a constructive refusal, or the rescission of the litigated decision and the issuance of a new decision.*"¹²⁸⁵ Even the original administrative decision will never be 'quashed' by the Indonesian Court.¹²⁸⁶ What the Court does is simply obligate the public official to revoke, renew, adjust or issue a new administrative decision.

Unlike the ideal *concessions*,¹²⁸⁷ the delegation of public service functions in the Jakarta Water Supply Cooperation Agreement contract is not enabled through

¹²⁸² Stern, J., 'The relationship between regulation and contracts in infrastructure industries' CCRP Working Paper No: 1
<<http://www.city.ac.uk/economics/dps/CCRP%20Working%20Papers/newjs2.pdf>> accessed February 12, 2011

¹²⁸³ Ibid

¹²⁸⁴ A case can either be rejected, proven, dismissed or declared as lapsed. See Undang Undang No. 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara Article 97.7 and Bedner, *Administrative courts in Indonesia: a socio-legal study* p. 128

¹²⁸⁵ Bedner, *Administrative courts in Indonesia: a socio-legal study* section 19, p. 128. This is based on Undang Undang No. 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara Article 97.9

¹²⁸⁶ Bedner, *Administrative courts in Indonesia: a socio-legal study* p.128

¹²⁸⁷ This is not to suggest that there is an ideal way for delegating public service to the private sector. Even in France, where the judiciary is more resourceful and has had centuries of experience with PSP, delegation of public service to the private sector has been highly criticised for lacking contractual clarity, inadequate or non-existent supervision, and lack of information to consumers. See report by Cour des Comptes, 1997, 'La gestion des services publics locaux d'eau et d'assainissement', Paris, *Les Editions du Journal Officiel*, January, as cited by Elnaboulsi, J.C., 'Organization, management and delegation in the French water industry' 72 *Annals of Public and Cooperative Economics* 507.

strong oversight by the Administrative Court. In fact, the Cooperation Agreement contains a clause which refers any dispute between PAM Jaya and the concessionaires to international arbitration. This dispute settlement clause – ideally – cannot prevent an ordinary citizen from filing a suit before the Administrative Court against any decision made by the concessionaires or PAM Jaya but, to a certain extent, does limit the state's control and oversight of the delegation of its public service.¹²⁸⁸ Finally, the use of confidentiality provisions on the Cooperation Agreement which covers both the contractual documents itself and any regulatory information generated therefrom, appears to contradict the original concept of a concession, which is, to advance public interest by the use of “private” hands.

Hence, although the Jakarta Cooperation Agreement contains the element of public service delegation from PAM Jaya to the concessionaires, the contract design departs from the original idea and intention of a *concession*. Instead of overarching state control, public interest oversight is limited by the use of confidentiality

Elnabousi continued: *“The lack of transparency is identified as a major problem by the report. The move to delegation was rarely properly evaluated. Contracts are ambiguous. Sub-contracting goes to sister companies in the same group without competition, and procedures are exempted from procurement rules. As a result, says the report, ‘The lack of supervision and control of delegated public services, aggravated by the lack of transparency of this form of management, has led to abuses.’”*

¹²⁸⁸ In order to succeed, concessions and other modes of delegation of public service to the private sector require strong state presence, enabled by the legal and contractual framework. According to Elnabousi: *“Thus, the only real source of municipality bargaining power is the threat to revoke delegation in favour of direct management. In fact, local authorities must be able to exert a particular strong credible threat to mitigate the risks of ex-post opportunism. French administrative law provides such credible threat because local communities are authorized to alter certain contractual terms or to suspend the contract: a breach of the contract's terms or a strategic use of contract incompleteness can lead to an immediate and irreversible penalty (i.e., the loss of the market held by the private company) only on the grounds of public interest.”* See *ibid* International arbitration clause on Jakarta's Water Supply Cooperation Contract effectively renders Jakarta regional government toothless. With them being unable to make worthy threats, ex post opportunism may flourish.

provisions and referral to international arbitration bodies. The drafters of the contract also fail to calculate Indonesia's Administrative Court's lack of institutional capacity in adjudicating such contracts.

6.4.3. Selection and removal of regulator (JWSRB)

As explained in the previous section, the governance structure of Jakarta's water services following the Cooperation Agreement becomes complicated. The Jakarta Water Service Regulatory Body (JWSRB) has no sufficient mandate to regulate and does not have the power to issue penalties or fines to the concessionaire. Its role is limited only to mediating disputes, organising coordination with bureaucratic offices and advising the Jakarta Governor on tariff issues. Final prices are determined by the Jakarta Governor and monitoring and supervision of contracts is done by PAM Jaya. Nevertheless, the Cooperation Agreement suggests that in the future JWSRB should be reinforced through a Regional By-Law.¹²⁸⁹ This move opens up opportunities for JWSRB to gain more regulatory authority.

The organisation of JWSRB is arranged simultaneously by two instruments which often overlap: the Jakarta Governor's Regulation¹²⁹⁰ and the Cooperation Agreement of 2001.¹²⁹¹ The provision on selection and removal of economic regulators is contained in Pergub-118. Members are appointed by the Governor and

¹²⁸⁹ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001

¹²⁹⁰ Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum

¹²⁹¹ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001

can be removed from their position.¹²⁹² The prerequisites of becoming a member of the regulatory body are: an Indonesian national 35-65 years of age, passed the fit and proper test, never been convicted of crime, declared bankrupt or under guardianship, has not been working for the concessionaire within the two years prior to its membership in the regulatory body and who will provide an undertaking that they will not be working for the concessionaires two years after its appointment, and finally, it is preferable that they have specific experience in drinking water provision, either from the technical, legal, financial or customer relations' perspectives, and is known among the professionals.¹²⁹³ The provision concerning undertaking is an improvement from the earlier version of the rule which does not regulate 'revolving door' properly.¹²⁹⁴ Nevertheless, it is not clear on the actual effect of such 'undertaking' if it is violated.

Pergub-118 stipulates that the selection process will be conducted by the Jakarta investment authority, which may impose additional prerequisites (presumably, as long as it does not contradict with what has been stipulated in the Pergub 118).¹²⁹⁵ An announcement must be made to the public explaining that a selection is to be commenced together with the details of the task, responsibility, prerequisites of appointment, authority and their rights as a member of the JWSRB.¹²⁹⁶ A professional

¹²⁹²Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum Art 12

¹²⁹³ ibid Article 11

¹²⁹⁴ Ibid See Article 9 which puts the prerequisite of "will not be working for the concessionaire" as conditions of appointment. See also the previous rule Peraturan Gubernur No. 54 Tahun 2005 Tentang Badan Regulator Pelayanan Air Minum

¹²⁹⁵ Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum Article 12

¹²⁹⁶ Ibid Article 13

consultant – presumably under contract with the Jakarta investment authority – should be hired to assess the candidates.¹²⁹⁷ The Pergub-118 does not enumerate the format and timing of an announcement except that it requires that it should be made before the appointment.

Membership of the regulatory body ceases when a member resigns, is mentally or physically ill for more than three consecutive months, is deceased, his term of office has ended or he violates the laws and regulations.¹²⁹⁸ Pergub-118 stipulates that a member of the regulatory body who violates laws and regulations can be temporarily suspended by the Governor¹²⁹⁹ for a period of a maximum of six months. Membership of the regulatory body can be reinstated by the Governor if the alleged violation is unproven.¹³⁰⁰

Almost similar to OFWAT, who must present its resource account to the comptroller¹³⁰¹, the JWSRB is also obligated by Pergub-118 to propose its expenditure plan to the Governor, through PAM Jaya.¹³⁰² Interestingly, although the Governor is the party who approves the regulator's expenditure plan, the regulator is accountable and must deliver its expenditure accountability report to PAM Jaya, which actually is also a regulated entity.¹³⁰³ Furthermore, it is PAM Jaya that is tasked

¹²⁹⁷ IbidArticle 13

¹²⁹⁸ Ibid Article 14

¹²⁹⁹ IbidArticle 14

¹³⁰⁰ Ibid Article 15

¹³⁰¹ See section 5.3.2 above on OFWAT's accountability mechanism

¹³⁰² Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum Article 20(4)

¹³⁰³ IbidArticle 22(3)

with evaluating the regulator's expenditure report.¹³⁰⁴ The role of the Governor is constrained to legalising and providing *acquiescence* to the report, **after** and based on the evaluation report made by PAM Jaya.¹³⁰⁵ This overlap signifies the power game between actors of the concession. Thus, although JWSRB's finance is secured through direct allocation from the escrow account, its budgetary planning is not independent since the 'regulator' is accountable to and supervised by the regulatee.

6.4.4. Conflict of interest

Except for Article 11 which provides that one of the prerequisites for appointment is that the person "*has not been working for the concessionaire within two years prior to its appointment in the regulatory body*" and Article 14.1.d forbidding members of the regulatory body be formally employed by another institution, there are no other provisions in Pergub-118 on conflict of interest. The prohibition on holding other formal employment might be difficult to materialise and at the same time be ineffective in preventing conflict of interest. As outside appointments may or may not cause conflict of interest, the best mechanism to prevent and avoid conflict of interest is through disclosure rules, as practiced in England. In Chapter III, this thesis discussed that Victoria's ESC members are allowed to hold other positions. Since the members of the regulatory body are not government employees, no other public law rules are applicable to them.

6.4.5. Means of Acquiring Information

¹³⁰⁴ Ibid Article 22(3)

¹³⁰⁵ Ibid Article 22(3)

As previously discussed, Jakarta's water services are suffering from ambiguous regulatory arrangements. JWSRB's real mandate under the Cooperation Agreement is only in conducting, monitoring and mediating disputes.¹³⁰⁶ PAM Jaya also has a regulatory role in supervising¹³⁰⁷ and even in enforcing penalties¹³⁰⁸ against their private partners. PAM Jaya obviously has a conflict of interest in this sort of regulatory structure, as it is both a regulator (equipped with sanctioning power by the contract) and, at the same time, also a party to the contract. In addition, there is the role of the Governor (with the approval of the regional parliament) who is in charge of determining tariffs.¹³⁰⁹

This fragmented regulatory structure has implications for information flow. As a party to the contract and a 'regulator', most reporting duties imposed on the private sector under the contract are towards PAM Jaya. PAM Jaya, for example, has powers to investigate, review, assess and evaluate the private partner's performance,¹³¹⁰ and inspect and take copies of the assets register.¹³¹¹ It is also entitled to "*obtain information and data*" from the private partners,¹³¹² acquire online access to all information and data,¹³¹³ and obtain monthly, quarterly, semi-annual, annual and

¹³⁰⁶ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 51

¹³⁰⁷ Ibid Clause 9.1. PAM Jaya has the right to: "*investigate, review, assess and evaluate the performance of the Second Party of its obligations under this Agreement so as to cause the Second Party's achievement of the Technical Targets and Service Standards*"

¹³⁰⁸ Ibid Clause 31

¹³⁰⁹ Ibid Clause 26

¹³¹⁰ Ibid Clause 35.2.a

¹³¹¹ Ibid Clause 13.4.c

¹³¹² Ibid Clause 35.2.b

¹³¹³ Ibid Clause 35.2.d

five-yearly reports.¹³¹⁴ There is also obligation for the concessionaire to submit reports, quarterly, monthly, semi-annually and five-yearly (or five annual?) reports.

There is also an obligation by the concessionaire to ‘maintain transparent accounts’ and the corresponding right of PAM Jaya – at any time – to audit such accounts,¹³¹⁵ and to enable other relevant governmental bodies to conduct audits and access, at all reasonable times, “all relevant books and records”.¹³¹⁶ There is no clarification on what is meant by a ‘transparent’ account. There is no distinctive regulatory account. The contract only refers to the Indonesian standard generally accepted accounting principles.¹³¹⁷ Meanwhile, there is only one clause in the contract empowering the JWSRB with an audit power and the concessionaires’ corresponding obligation to “*provide all requested information and data*” for the purpose of such audits.¹³¹⁸

Since PAM Jaya has a conflict of interest in the regulatory structure, it may have an interest not to share all regulatory information it receives from the private partners with JWSRB. Often there are disagreements between the JWSRB and PAM Jaya. The regulatory structure creates incentives to PAM Jaya not to disclose information to the public which will be explained in the next section.

¹³¹⁴ Ibid Clause 35.3 Unfortunately, the content of such reporting obligation is not outlined in the contract as they are stipulated in the “Procedure on Performance Supervising and Evaluation System Agreement” which is confidential and not available to the author.

¹³¹⁵ Ibid Clause 50.1.a

¹³¹⁶ Ibid Clause 50.2

¹³¹⁷ Ibid Clause 16.3

¹³¹⁸ Ibid Clause 50.1.b

Therefore, JWSRB lacks regulatory powers to acquire information and may not receive adequate input of information from its counterpart, PAM Jaya, due to PAM Jaya's interest in non disclosure. As a result, despite its relatively reformist stance, JWSRB only has a little information to be disclosed to the public.

6.4.6. General Disclosure Policy

Jakarta's regulatory bodies are constrained from disclosing information arising out of the concession due to the confidentiality clause on the Cooperation Agreement. This has been the primary impediment towards transparency.

The clause obligates the parties to keep all information arising out of the contract confidential, unless both of the parties agree otherwise. Through some informants, the author is able to confirm that the confidentiality clause reads as follows¹³¹⁹:

47.1 General Provisions

The parties, officers, directors, experts and/or personnel and agents of each Party are obliged to maintain the confidentiality of all commercial and technical information which they possess and has been obtained from each Party, and are forbidden from using the information except for the purposes intended in this Agreement, except for that categorized as:

(a) information which was already controlled/possessed by one Party, unless it should have been known by such Party that such information constitutes confidential information of the other Party;

¹³¹⁹ Ibid Clause 47.1 and 2

(b) information which was public knowledge at the time it was revealed under this Agreement; and

(c) information which became public knowledge after being revealed under this Agreement.

47.2 Disclosure of Confidential Material

(a) The Parties may disclose the confidential information referred to in Clause 47.1 to a third party for the purpose of implementation of this Agreement, with the stipulation that a written agreement has been made before the information is disclosed to ensure that the third party receiving the information will maintain its confidentiality and only use the information for the purpose for which it was disclosed.

(b) In the event of a disclosure of information as intended in Clause 47.2(a), in the interest of the implementation of this Agreement, the disclosure must first be approved by the other Party.

Without any waiver clause or Freedom of Information override, such a clause impedes the application of the FoI Law. In Victoria's water project, the confidentiality clause is complemented by a waiver clause, which requires compliance with FoI Act or other legislations (see section 4.2.2 and 4.2.3 above).

First, it is relevant to ask: who are bound by this provision? The Cooperation Agreement mandates that all parties (Pam Jaya and the concessionaires) and people affiliated with them (this includes directors, experts, personnel) shall “*maintain the confidentiality of all commercial and technical information which they possess and*

has been obtained from each Party”.¹³²⁰ It is to be noted that the term ‘party’ here refers to the concessionaires and PAM Jaya. It is interesting to ask if the regulatory body (JWSRB) and officials at the Governor’s office can also be bound by this clause. Strictly speaking, as a non-party, they cannot be directly bound by the contract. However, as the regulatory body is instituted under the contract, they adopt some of the principles stipulated therein, and this includes the policies to preserve confidentialities. This prompts a question on the transparency impact of the *hybrid* model.¹³²¹

Secondly, it is relevant to discuss the breadth of this provision. Which information is covered by the confidentiality clause? One must note that the term “commercial and technical information” covers a wide range of information. In practice, this clause effectively shields all information acquired by PAM Jaya through reports and investigation towards the concessionaires. In other research conducted by the author, not only regulatory information is treated as confidential, but also the Cooperation Agreement itself.¹³²² The regulator considers that the contract confidentiality clause extends into the contract document itself. This was confirmed by a field interview with Palyja, which also interprets that the confidentiality clause is meant to cover both information arising out of the contract and the contract itself.¹³²³

¹³²⁰ Ibid Clause 47.1

¹³²¹ For discussion on “hybrid” model of regulation see Eberhard, ‘Infrastructure regulation in developing countries: an exploration of hybrid and transitional models’ See Sections 1.4.2, 1.5.5 and 2.1

¹³²² Al'Afghani and others, *Transparansi Lembaga-lembaga Regulator Penyediaan Air Minum Di DKI Jakarta*

¹³²³ Interview with Palyja in Jakarta, January 10, 2011. Palyja regard that the confidentiality clause may provoke suspicion and erode public trust.

Finally, this stance was confirmed by an official FoI request¹³²⁴ made by an NGO to PAM Jaya. The NGO request demanded that PAM Jaya disclose (a) Jakarta Water Cooperation Agreements along with its amendments, (b) results of financial audits conducted by the state audit agency and (c) financial projections used in determining water tariffs. However, PAM Jaya, through a letter¹³²⁵ cited the summary of clause 47 above and refused to disclose the requested information, including the Cooperation Agreement itself. Thus, the private sectors, JWSRB and PAM Jaya all have one voice in this matter: the confidentiality clause extends to the concession contract itself. The case, at the time of this writing, is currently being appealed to the National Freedom of Information Commission.¹³²⁶

This restriction from disclosure under Clause 47 has four qualifiers: (1) disclosure can only be made to “third parties”, (2) disclosure can only be made with the purpose of implementing the Cooperation Agreement, (3) the disclosing party and the third party must enter into a confidentiality agreement prior to the disclosure and, (4) all parties to the Cooperation Agreement must agree to the disclosure.¹³²⁷ Public disclosure of any regulatory information acquired by PAM Jaya is then virtually impossible, as the contract requires any third parties to enter into confidentiality agreement with the disclosing party. The qualifiers are only designed to disclose

¹³²⁴ Reza, M., *Permintaan Dokumen dan Informasi Kontrak Konsesi Layanan Air Minum Jakarta (Freedom of Information Law Request for Documents and Contractual Information Concerning Jakarta's Water Services Concession)*, Letter No.019/KIP/V/2011 dated October 31, 2011 (KRuHA 2011)

¹³²⁵ Daryanto, *Jawaban Surat KRuHA (Letter No. 581/DIV.T&P/XI/2011 dated November 8 2011 on PAM JAYA's response to FoI Request by KRuHA)*

¹³²⁶ Rizal, *Tanda Terima Pendaftaran Pengajuan Sengketa Informasi No. A26/RSI/P/XII/KIP/2011, KRuHA vs PDAM DKI Jakarta, 07-12-2011* (Komisi Informasi Pusat (KIP) 2011)

¹³²⁷ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47.2

information to specific third parties, such as accountants and auditors but not the public.

Furthermore, this clause serves primarily the interest of the concessionaire, although it is formulated to apply to both parties. This is because all regulatory information tends to flow from the concessionaires to PAM Jaya through the reporting duties and investigative powers as discussed in the previous section, and not the other way around. It is PAM Jaya who has the obligation to be accountable in its dealings with third parties, including the concessionaire, and therefore might be required to disclose some regulatory information.

Pergub-118, which is the primary legal basis for the establishment of the regulatory body outside the Cooperation Agreement, stipulates that the JWSRB is obligated to maintain confidentiality of *all* information and can only utilise information for the purposes of mediating disputes between the contracting parties.¹³²⁸ This is despite the fact the Pergub-118 refers to the Indonesian Freedom of Information Law. In addition, JWSRB enacted its internal code of conduct on participation and transparency, the Regulatory Body Rule No. 2 Year 2007 on the Mechanism and Procedure of Transparency in Jakarta's Water Services.¹³²⁹ Since JWSRB's initial mandate is weak, the rule has no legitimate binding power, although in practice it is used as a basis for JWSRB's operation. Despite the word

¹³²⁸ Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum Article 5.b . Note that the JWSRB's primary function is mediating disputes. See section 6.1.3.4 above. The JWSRB lacks the power normally accorded to independent regulatory bodies, such as in determining tariffs or imposing penalties. This article appears to be drafted in light of that purpose.

¹³²⁹ Peraturan Badan Regulator Pelayanan Air Minum DKI Jakarta No. 02 Tahun 2007 Tentang Mekanisme Dan Prosedur Transparansi Pelayanan Air Minum Jakarta

“transparency” in the rule’s title, the rule makes no mention of public disclosure of regulatory information.

To conclude, although the JWSRB and its officials and agents are not a party to the contract, the regulation which establishes them incorporates the contract’s confidentiality principles. As a result, public disclosure of regulatory information becomes impossible.

This is in contrast with other regional-owned waterwork companies which do not engage with private sector participation, such as Bogor. Unconstrained by any confidentiality obligation to another party, Bogor, a city 60 kilometers south of Jakarta, regulates in its regional by-law that the utility must provide periodical performance reports for the purpose of transparency, to the public.¹³³⁰

6.4.7. Service Levels and Customer Service

Service levels and customer service in Jakarta’s water supply are regulated through several rules which often overlap. The first layer is GR-16 and its implementing regulations enacted by the central government, which includes regulations from the Ministry of Health on drinking water quality¹³³¹ and rules from the Ministry of Public Works¹³³² on drinking water supply provision system.

¹³³⁰ Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor Article 3 (2) (c)

¹³³¹ , Peraturan Menteri Kesehatan Republik Indonesia No. 492/Menkes/PER/IV/2010 Tahun 2010 Tentang Persyaratan Kualitas Air Minum

¹³³² Indonesia, Peraturan Menteri Pekerjaan Umum No.18/PRT/M/2007 Tentang Penyelenggaraan Pengembangan Air Minum Sistem Penyediaan Air Minum

In the second layer, there is the 1993 pre-concession Jakarta regional by-law on “*Drinking Water Services in Jakarta Region*” (By-law 11)¹³³³ and several regulations issued by the governor, such as Pergub-118¹³³⁴ regulating the JWSRB and some other Governor’s regulations on automatic tariff adjustments. In the third layer, there is the Cooperation Agreement¹³³⁵ along with its addendum and annexes, which contain prescriptions on service levels to which the concessionaire must adhere.

These rules often overlap and contradict each other. As previously discussed, both the regulator and the concessionaire believe that GR-16 is not applicable to the Cooperation Agreement.

6.4.7.1. GR-16

GR-16 obligates cooperatives and privately-owned business enterprises involved in drinking water provision to follow planning, management, monitoring and evaluation guidelines issued by the minister and to provide the regional or central government with information on their service delivery.¹³³⁶ Article 67 of the GR guarantees all customers the right to obtain drinking water services which fulfil the quality, quantity and continuity standards¹³³⁷, to obtain information on the structure and the amount of tariffs and bills, to lodge a lawsuit for any harm resulting from the

¹³³³ By Law 11/93

¹³³⁴ Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum

¹³³⁵ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001

¹³³⁶ Art 66, Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) Ministerial guidelines are available but not sufficiently clear Indonesia, *Peraturan Menteri Pekerjaan Umum No.18/PRT/M/2007 Tentang Penyelenggaraan Pengembangan Air Minum Sistem Penyediaan Air Minum*

¹³³⁷ Art 67.1, Peraturan Pemerintah No. 16 Tahun 2005 (GR-16)

service, to obtain compensation against any negligence in service delivery and to obtain sewerage services or on-site sanitation services.¹³³⁸

Water services providers are obligated to (a) guarantee services based on the prescribed standards, (b) provide information to all interested parties on any occurrences or specific circumstances which have the potential to alter the quantity or quality of service and to (c) provide information on the implementation of service.¹³³⁹ GR-16 does not provide examples of what sort of circumstances have the possibility of altering service levels. However, the wide formulation of the clause would mean that all sorts of deviation from service levels, including disruptions or contamination, would require the water utility to inform and warn customers.

Under the Freedom of Information Law there is also an obligation to announce to the public any information which may threaten the ‘livelihood’ of many people and the ‘public order’.¹³⁴⁰ Such information must be disclosed in manners accessible to the community and in an understandable language.¹³⁴¹ According to the government drafter of the Indonesian FoI Law UU No. 14/2008, ‘livelihood’ is to be understood as the ‘society’s needs’ and ‘public order’ is to be understood as ‘concerning a person’s life’.¹³⁴² This formulation renders it certain that vital information concerning contamination of water supplies falls under this clause.

¹³³⁸ Ibid

¹³³⁹ Art 68, *ibid*

¹³⁴⁰ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 10

¹³⁴¹ Ibid

¹³⁴² See Anotasi Undang Undang Nomor 14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Edisi Pertama, Komisi Informasi Pusat, 2009, p.136

6.4.7.2. By-law 11

By-law 11/1993 stipulates that the Jakarta Governor appoints PAM Jaya as a caretaker in undertaking the provision and distribution of drinking water¹³⁴³ and that PAM Jaya has the obligation to provide the service to the community.¹³⁴⁴ By-law 11 regulates the prerequisites for connecting to the mains network¹³⁴⁵ and the boundaries on liability for maintenance of assets.¹³⁴⁶ The consumer's rights and obligations are also regulated in By-law 11/93, however, they put weight on consumer's obligations towards the utilities and not their rights.

GR-16 and Water Law 7/2004 could be implemented in the regions when they have been incorporated in regional legislations. Nevertheless, the by-law has never been amended since its enactment in 1993, thus, it is disconnected from GR-16 and Water Law 7/2004.¹³⁴⁷

¹³⁴³ Article 2.1 By Law 11/93

¹³⁴⁴ Article 2.2 *ibid*

¹³⁴⁵ *Inter alia*, that the request to connect has to be in writing, Article 4.2. Other prerequisites are listed in Article 7 *ibid*

¹³⁴⁶ Consumers are responsible for pipes existing in their parcels of land, although prior checking by PAM Jaya is obligatory, Articles 7.b and 8 of *ibid*

¹³⁴⁷ The concession might be one of the reasons why the by-law has never been amended to ensure compliance with national legislations in the water sector. Changing the by-law would require changing key terms in the concession contract which directly affects the contract's economics. The cost for renegotiation is high, meanwhile, the government's and the parties' concern is to keep the contracts afloat, by insulating it from sudden changes. This begs the question of whether regulation by contract, and concession especially, will have the effect of restraining sectoral reform. See Al'Afghani, M.M., 'When It Comes to Water Services, Jakarta Is Living in the Distant Past' *The Jakarta Globe*, October 16, 2011 <<http://www.thejakartaglobe.com/opinion/when-it-comes-to-water-services-jakarta-is-living-in-the-distant-past/471774>> accessed May 24, 2012 also Al'Afghani, M.M., 'Anti-Privatisation Debates, Opaque Rules and 'Privatised' Water Services Provision: Some Lessons from Indonesia' in Alan Nicol,

6.4.7.2.1. Consumer obligations and liabilities

Consumers are responsible for the installation and examination of the auxillary reticulation network (*pipa persil*) in accordance with PAM Jaya's standards¹³⁴⁸ and the maintenance of the auxillary reticulation network including the replacement thereof¹³⁴⁹. It must also allow utilities' officials to access buildings and land occupied by them for the purpose of maintenance of water meter and networks¹³⁵⁰. Furthermore, consumers are responsible for the repair of the main reticulation network within [or below] consumers' land and buildings which occurred due to consumers' omissions or actions¹³⁵¹ and to care for water meters in their lands or buildings¹³⁵². Customers are obliged to pay a connection fee, the amount of which will be determined by the Director of PAM Jaya,¹³⁵³ and to pay a guarantee fee, the amount of which will be determined by the Director of PAM Jaya.¹³⁵⁴ Consumers are also obligated to pay their monthly fees at the venue determined by PAM Jaya¹³⁵⁵ and to pay late fees if payments are not made within five days after the billing date¹³⁵⁶.

In addition to the above, By-law 11 contains a list of prohibitions, for everyone and not just consumers,,for example, the prohibition of disrupting or

Lyla Mehta and Jeremy Allouche (eds), *IDS Buletin: 'Some for All?' Politics and Pathways in Water and Sanitation*, vol 43.2 (Institute of Development Studies, Wiley-Blackwell 2012)

¹³⁴⁸ By-law 13/1992 Article 7

¹³⁴⁹ By-law 13 Art 8

¹³⁵⁰ Article 9.1 and 2, By Law 11/93

¹³⁵¹ Article 9.3, *ibid*

¹³⁵² Article 10, *ibid*

¹³⁵³ Article 14 .1 and 2, *ibid*

¹³⁵⁴ The guarantee fee can be refunded when they cease to become customers. Article 15, *ibid*

¹³⁵⁵ Article 21.1 *ibid*

¹³⁵⁶ Article 21.2, *ibid*

destroying piped networks, tampering with metering devices, bypassing water meters, or changing the diameter of installed pipes, distributing or selling water from their home tap or directly (illegally) connecting to the main network.¹³⁵⁷ Such prohibitions come with criminal provisions of up to three months of imprisonment and shall be classified as a ‘crime’ under the criminal code¹³⁵⁸ as well as administrative penalties in the form of ‘revocation of connection licence’¹³⁵⁹ and compensation fees equal to the volume of water stolen, the amount of which will be determined by PAM directors.¹³⁶⁰

Customers who do not pay within five days after the due date will be temporarily disconnected¹³⁶¹ and those failing to pay within one month after the due date will be permanently disconnected.¹³⁶² In both cases, re-connection is possible after the indebted amount and the late fees are paid.¹³⁶³

During field interviews, it was revealed that PAM Jaya had pressed Palyja to enforce disconnection provision on By-law 11.¹³⁶⁴ PAM Jaya had blocked Palyja’s revenue in the escrow account for failing to enforce the by-law. Palyja maintained, however, that disconnection does not create an incentive for people to pay since they

¹³⁵⁷ Article 24 *ibid*

¹³⁵⁸ Article 25 *ibid*

¹³⁵⁹ Article 27 *ibid*

¹³⁶⁰ Article 28 *ibid*

¹³⁶¹ Article 21.3, *ibid*

¹³⁶² Article 21.4, *ibid* If permanent disconnection occurs, the network and water meter will be sealed.

¹³⁶³ Article 21.5 and 6, *ibid*

¹³⁶⁴ The field interviews cannot reveal the motivation of PAM Jaya in using its power to block the escrow. It is possible that it is the only means for PAM Jaya to force the renegotiation of the Cooperation Contract. However, this was done to the detriment of Palyja and eventually the consumer, since it prevents Palyja from conducting repair work or investing in assets. Personal Communication, *Field Interview with Palyja, Jakarta, January 10, 2011*

do not have the financial capacity to pay.¹³⁶⁵ The parties eventually agreed to enforce the by-law in specific regions of Jakarta, for a limited six month period.

6.4.7.2.2. **Consumer ‘rights’**

According to By-law 11, consumers have the right to ask for examination of their water meter¹³⁶⁶ and to complain against inaccurate water metering, however, such complaint does not in any way suspend their obligation to pay their monthly water tariffs¹³⁶⁷ and in the event the inaccuracy is proven, the payment should be measured based on the average water use in the previous three months¹³⁶⁸ or PAM Jaya will arbitrarily decide the estimate of amount that should be paid.¹³⁶⁹ In the event that overcharging or undercharging occurred, the payment should be compensated the coming month.¹³⁷⁰

By-law 11 at Article 24 lists several activities which are considered violations and “crimes”, such as tampering with water installations, reselling or distributing water outside the customer’s property and stealing water from the pipes. All these crimes come with harsh monetary, administrative and criminal punishments. One of the consumer “rights” is to object to the Governor against monetary penalties determined by the PAM Jaya Director. The decision of the Governor with regards to this objection, according to By-law 11, is “binding” and no other possibility of access

¹³⁶⁵ Ibid

¹³⁶⁶ Article 20.1 By Law 11/93

¹³⁶⁷ Article 19.1 and 2, ibid

¹³⁶⁸ Article 19.3, ibid

¹³⁶⁹ Article 19.4, ibid

¹³⁷⁰ Article 19.5 ibid

to justice is presented ¹³⁷¹, although actually, access to the Court in general is guaranteed in national legislation.¹³⁷²

It is a very disturbing fact that the only rights guaranteed by By-law 11 are the right to complain against an incorrect water meter to PAM Jaya and the right to object to penalties to the Governor. There are no clauses regulating the provision of water for vulnerable groups and the economically weak, no provision on payments in arrears and no provision stipulating the customer's right to enjoy uninterrupted water services at a specific quantity, quality and pressure. This is in contradiction with higher laws such as GR-16 and Water Law 7/2004. However, since water services are a decentralised matter and national legislations mandate regional government in its implementation, it is By-law 11 and the Cooperation Agreement (discussed below) that is deemed to be the prevailing law.

6.4.7.3. The Cooperation Agreement

The Cooperation Agreement obligates the concessionaires to meet certain service levels¹³⁷³. Concessionaires are given the liberty to determine the *means and method* for delivering the service standards as set on the contract schedule. There is also an obligation to conduct sampling and testing of water quality in accordance with standards agreed by the Ministry of Health, complemented by the obligation to deliver the test results to PAM Jaya, every month. PAM Jaya is allowed to exercise its own testing on the condition that it does not hinder the concessionaire's daily operation.

¹³⁷¹ Article 28.3 *ibid*

¹³⁷² Undang Undang Pokok Kekuasaan Kehakiman No. 48 Tahun 2009

¹³⁷³ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Schedule 8

The parties may refer examination to an independent expert should disagreement concerning compliance of water quality arise.

Service levels¹³⁷⁴ consist of ambient water quality standards, drinking water standards, pressure at customer connection, maximum response time to answer phone calls, attendance time to respond to complaints, time for completion of repairs, and the obligation to connect in areas where mains are available. Categorisation of these standards is made available on JWSRB's website¹³⁷⁵, but the details have never been officially disclosed by the authorities and the concessionaire.

Hence, there is no way for customers in Jakarta to know the services to which they are entitled, despite the obligation under GR-16 that private water undertakers are obligated to provide information on the implementation of service.¹³⁷⁶ In 2007, the regulatory body insisted to the media that the Cooperation Agreement contains a clause mandating compensation to consumer in the amount of IDR 50000

¹³⁷⁴ Ibid Clauses 31.1 and 31.2

¹³⁷⁵ Jakarta Water Supply Regulatory Body, 'Kinerja Operator' (JWSRB) <http://www.jakartawater.org/index.php?option=com_content&view=article&id=96&Itemid=257&lang=en> accessed August 18, 2011

¹³⁷⁶ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) does not expressly obligate the disclosure of the service standard itself, only its *implementation* is obligated to be disclosed. The obligation to disclose service standard is implied. *Ibid* Article 68.2 (a) guarantee services based on the prescribed standards, (b) provide information to all interested parties on any occurrences or specific circumstances which has the potential to alter the quantity or quality of service and to (d) provide information on the implementation of service. The Public Service Law also obliges Public Bodies to inform the content of any cooperation agreement entered into between them with third parties to the communities. The information should at least explain important issues which should be known to the community such as the type of the outsourced project, identity of the provider, the contract period, and the work commenced by the provider in accordance with service standard. Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik Article 13.1.b and its elucidation

(approximately USD 5) if a disruption occurs for more than one day. A member of the regulatory body stated:

*“The JWSRB has requested, over the last 6 months, that customer rights should be published. However, the operators always refuse. Without publication on the mass media, Jakartans will never know their rights with respect to service disruption”.*¹³⁷⁷

Note that JWSRB is constrained from publishing the contract due to a confidentiality clause¹³⁷⁸ and its statute¹³⁷⁹ which – pursuant to the contract – prohibits the disclosure of regulatory information.

Such a stance was also supported by the JWSRB Chairman at that time, Ahmad Lanti, who suggested that disclosure of consumers’ rights would enable the community to file class action suits in order to obtain such compensation.¹³⁸⁰ The PAM Jaya Director, however, denied that such a compensation scheme exists.¹³⁸¹

The Cooperation Agreement obliges the concessionaire to complete repairs following any interruption, at a maximum, within 24 hours after it occurs. Failure to comply with such a requirement may trigger a penalty and, in addition, the obligation to pay compensation to consumer.¹³⁸² Schedule 15 reads:

¹³⁷⁷ Statement of Dr. Riant Nugroho as quoted by Kompas See ‘Hak Pelanggan Disembunyikan (Customer's Rights are Concealed)’ *Daily Kompas* (Jakarta, November 27, 2007). On Personal Communication with the author, Dr. Nugroho confirmed such statement.

¹³⁷⁸ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47

¹³⁷⁹ Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum Article 5b

¹³⁸⁰ ‘Hak Pelanggan Disembunyikan (Customer's Rights are Concealed)’

¹³⁸¹ Ibid

¹³⁸² Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Schedule 15

“Every Customer who complains in writing to the Second Party shall be entitled to a rebate in the next month's Customer bill of 10% of the Customer's bill for the month in which the complaint arose - with a minimum rebate of Rp. 10,000 and a maximum rebate of Rp.50,000.

If a Customer claims compensation in excess of Rp.50,000, the Customer shall only be entitled under this Schedule to a maximum of Rp.50,000 with the balance of any claim to be settled by mutual agreement between the Second Party and the Customer or through some other mediation, arbitral or court process.

Rebates will be made directly to the Customer in the next month's Customer bill, without affecting project revenue.”

When water quality is not in compliance with the prescribed standard, the Cooperation Agreement obliges the parties to hold ‘discussions’ *“for the purposes of establishing the reason for the non-compliance”*.¹³⁸³ Only when it is found that the concessionaire is at fault will it be responsible to repair the service and pay a penalty. The italicised clause above implies that non-compliance is permissible if it is not due to the first party’s fault.¹³⁸⁴

With only three healthy rivers flowing to Jakarta (out of 19), the supply of bulkwater is in a critical situation. During certain seasons silt causes damage to water

¹³⁸³ Ibid Clause 21.g.

¹³⁸⁴ There are probabilities that the supply of bulkwater decreases in terms of quality and quantity. Such a condition is beyond the reach of concessionaire’s abilities. This clause protects the concessionaire from being penalised for failures in bulkwater supplies. See *ibid* Clause 11

pumps and treatment installations and eventually causes disruptions. As the contract places the risk of bulkwater supply on PAM Jaya, the clause above often effectively shields the concessionaire from its obligation to pay penalty fees caused by the disruption.

In 2009, news emerged that Aetra offset 183 billion IDR worth of penalty fees to PAM Jaya. Even with such offset, PAM Jaya still owes Aetra another IDR 237 billion, which if not paid, will be billed by the time the concession ends in 2022.¹³⁸⁵ Thus, as a result of the “water charge” system and bulkwater insecurity, PAM Jaya has a large amount of debts towards the private partners. If customers are compensated, the funds generated from penalty payments will not be able to offset the repayment of such debts.

There is no obligation to disclose non-compliance by the concessionaire and the JWSRB has no discretionary power to do so. The confidentiality clause also impairs PAM Jaya from disclosing information on non-compliance.

6.4.7.4. Comparison with Bogor

¹³⁸⁵ In the Jakarta concession system, PAM Jaya pays the concessionaires based on the volume of water sold to consumers calculated through an indexation formula, taking into account exchange rate and inflation rate (this is called “water charge”). Tariff, on the other hand, is set by the Governor, and is divided into several bands, depending on the customer’s economic situation. If collection of tariff payment is unable to meet the water charge, PAM Jaya owes money to the Concessionaire (“shortfall”). Apparently, the set-off was to pay the amount of shortfall PAM Jaya owes to Aetra. What is not known is whether there are portions of money for consumers in that transaction. The concession contract obliges that compensation to consumers are paid directly. See *ibid* definition of “Water Charge” and clause 35

In order to avoid the presumption that such a problem is typical in developing countries where there is a general lack of governance, it is relevant to briefly provide another Indonesian case study. Bogor is a municipality 60 km south of Jakarta where the company is publicly owned. The city's population is a lot smaller, 750,000, compared to Jakarta's 10 million. Unlike Jakarta, which relies on 1992 and 1993 by laws, and has never reformed these even after the concession was concluded, Bogor's water services by-laws were modified in 1996 and 2006. The 2006 amendment is a particularly distinctive one as it contains many guarantees on service levels and customers' right. The regional autonomy, which delegates the management of drinking water services to regional governments, might have been the driver for these reforms. This can be seen from the tendency in several other regions to conduct utilities' reform after autonomy was introduced in 2001.¹³⁸⁶

In Jakarta's by-laws there is a duty to serve connection requests from industry, residential, tourism, etc.¹³⁸⁷ imposed on the regional-owned waterwork company that is a partner of the concession contract to the private sector. However, there is no duty directly imposed on the private sector to connect the customer. In Bogor, there is a general duty 'to serve' water services for Bogor residents and a specific duty to extend the network to regions with inadequate groundwater quality.¹³⁸⁸

¹³⁸⁶ See regional by laws enacted in various regions, for example, Peraturan Daerah Kabupaten Sragen No. 8 Tahun 2004 Tentang Perusahaan Daerah Air Minum Kabupaten Sragen Peraturan Daerah Provinsi Kalimantan Barat No. 2 Tahun 2006 Tentang Pendirian Perusahaan Daerah Air Minum Provinsi Kalimantan Barat Peraturan Daerah Kabupaten Takalar No. 15 Tahun 2003 Tentang Perusahaan Daerah Air Minum Peraturan Daerah Kendal No. 13 Tahun 2011 Peraturan Daerah Kabupaten Maros No. 4 Tahun 2011 Tentang Perusahaan Daerah Air Minum

¹³⁸⁷ By Law 11/93

¹³⁸⁸ Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor Article 3 hereinafter "By Law 5 (Bogor)"

In terms of service levels, the Jakarta by-laws refer to to the Ministerial Decree on drinking water quality¹³⁸⁹; but in practice, changes to the Decree are not automatically applicable. Due to the concession, changes in water quality regulation must be negotiated with the private sector. On the other hand, any changes to water quality regulation are directly applicable in Bogor. The Bogor regional by-law also contains provisions regulating service disruptions, the general obligation for the regional waterwork company to supply water with a certain quality, continuity and quantity (except on the event of *force majeure*) and a 24-hour call centre and mailbox for customer service.¹³⁹⁰ These service levels are clearly stipulated in the Bogor regional by-law and are therefore published. As discussed in the previous section, in Jakarta, the service levels are regulated in Schedule 8¹³⁹¹ of the Cooperation Agreement and is a part of contractual confidentiality.

In terms of customers' rights, the only 'right' available under the Jakarta regional by-law is the 'right' to object to an incorrect water meter to PAM Jaya¹³⁹², the 'right' to object to the imposition of penalties by the Governor and the 'right' to request an examination of a water meter – discussed earlier. Even these are not directly formulated as rights. The word used is 'may' (i.e. "*dapat mengajukan keberatan*" / i.e. 'may' propose objection). The Cooperation Agreement contains some stipulation on customers' rights including compensation payments for

¹³⁸⁹ By Law 11/93 Article 19.1

¹³⁹⁰ Article 5, *ibid*

¹³⁹¹ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Schedule 8

¹³⁹² Article 15, By Law 11/93

violation of service level standards in “Schedule 15” of the contract as argued by the regulator, but this schedule, as it forms a part of the contract, is also confidential.

On the other hand, the Bogor regional by-law contains provisions guaranteeing the right to (i) obtain results on the examination of water quality, accuracy of metering device, calculation of water bill, (ii) obtain explanation of the agreed terms when submitting new connection requests, (iii) obtain information on the structure and amount of tariff, (iv) receive a 50% discount on monthly fee if water supply is disconnected for three consecutive days without prior notice, (v) receive discount if the water company fails to respond within three days after a leakage occurs, which causes elevation of customers’ bills, (vi) obtain replacement of water meter if the installed meter is not working and (vii) to convey their complaints on water bills, water distribution, quality and other matters related to water services.¹³⁹³ All of these rights and compensation mechanisms are stipulated in the by-law and, by default, a published document.

6.4.8. Investment

The contract stipulates for a five-year investment programme and an annual Investment and O/M programme.¹³⁹⁴ The five-year programme must be agreed by PAM Jaya but the yearly investment and O/M programme requires only to be discussed with them.¹³⁹⁵ The obligation to invest and extend the network is also

¹³⁹³ Article 20, Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor

¹³⁹⁴ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 9.4.F

¹³⁹⁵ Ibid Clause 9.1.F

formulated in terms of “technical targets”¹³⁹⁶, detailed in schedule 8¹³⁹⁷ of the contract, which consists of the volume of water billed, production of potable water, non revenue water, number of connections and the ratio of service coverage¹³⁹⁸. The companies have full discretion on how to implement them.¹³⁹⁹ By the end of the contract period, the contract target is 100% of coverage, which means that all of Jakarta should be connected to the water network.¹⁴⁰⁰

Bakker maintained that the system in Jakarta is implicitly ‘anti-poor’ as it conveys disincentives to both providers and the poor to connect to the network.¹⁴⁰¹ The disincentives for the poor to connect according to Bakker are:

“insecure tenure, the need for flexibility of payment, convenience, status and high ‘transaction costs’ which includes the infrastructure costs to build storage because networked water supply is only intermittent; line-ups and time off work to pay bills (for those without bank accounts and regular income); fear of time required to deal with mis-read meters and over-charging)”.¹⁴⁰²

The concessionaire also faces some disincentives in connecting to the poor. On the face of it, the system of water charges which pays the concessionaire based on the volume of water they sold (in accordance with indexation formula and other

¹³⁹⁶ Ibid Clause 9.4.B

¹³⁹⁷ Ibid, Clause 20

¹³⁹⁸ Ibid, Schedule 8

¹³⁹⁹ Ibid Clause 9.4.B

¹⁴⁰⁰ Ibid, Schedule 8 Aetra’s coverage in 2007 was 66.08% while its target was 74%. See Lanti and others, *The First Ten Years of Implementation of the Jakarta Water Supply 25-Year Concession Agreement (1998-2008)*

¹⁴⁰¹ Bakker, ‘Conflicts over water supply in Jakarta, Indonesia’

¹⁴⁰² ibid p. 115

variables) should not influence their decision to connect. This assumption was confirmed by the private sector during an interview in Jakarta.¹⁴⁰³ Bakker found that disincentives occur because the poor are covered by the lowest tariff band and the income generated by extending the network to them falls below the production cost.¹⁴⁰⁴ Connecting to the poor means reducing PAM Jaya's capability to collect more revenue and this will eventually affect PAM Jaya's ability to pay¹⁴⁰⁵ water charges to the concessionaires.¹⁴⁰⁶ Other disincentives built in to the system are due to the disorderly distribution of homes which raises the transaction costs, and lack of land tenure.¹⁴⁰⁷

Expansion to poor areas with lack of land tenure has been inhibited by the presence of mafia-like¹⁴⁰⁸ organisations controlling public hydrants, which benefit from very high prices for the amount of water sold from these taps to the poor.¹⁴⁰⁹ The flow of money from these activities could also be used to capture policy-making in network expansion to the poor. Bluntly said, not connecting to the poor benefits both the concessionaire (by reducing the risk of non payment from PAM Jaya and the

¹⁴⁰³ The private sector commented that, due to the in built system of water charge, they extend the water network solely due to demand considerations. PAM Jaya's Concessionaire, *Personal Communication with the Private Sector* (January 11, 2011)

¹⁴⁰⁴ According to Bakker's research in May 2005, the lowest tariff is IDR 500 whereas the production cost is approximately IDR 3,000

¹⁴⁰⁵ See also the discussion on PAM Jaya's debts above

¹⁴⁰⁶ Bakker, 'Conflicts over water supply in Jakarta, Indonesia' p.123

¹⁴⁰⁷ Ibid p.128

¹⁴⁰⁸ Lovei, L. and Whittington, D., 'Rent-extracting behavior by multiple agents in the provision of municipal water supply: a study of Jakarta, Indonesia' 29 *Water Resources Research*

¹⁴⁰⁹ 'Pay Up: How the Water Mafia Controls Access' (*The Jakarta Globe*, 2009) <<http://thejakartaglobe.com/waterworries/pay-up-how-the-water-mafia-controls-access/319989>> accessed February 3, 2010

high risk of transaction cost by connecting to the poor) and also benefits complicit officials through high rent-extraction from selling water from public taps.

A transparent system would enable the public to comment and participate in network expansion and investment plans.¹⁴¹⁰ Achievement of the concessionaire's technical targets is published partially (but not routinely) by the regulatory body on its website¹⁴¹¹ and is discussed widely in books published by them.¹⁴¹² However, what is urgent for the citizen is the *plan* itself, the outcome of which will have a direct effect on their livelihood. In an interview with Palyja¹⁴¹³, they pointed out that they voluntarily submitted an investment plan every three months before year-end to PAM Jaya although it is not required by the contract. This is a good practice but, unfortunately, this submission is not followed by a public disclosure from PAM Jaya or the regulatory body to the public. There are also no adequate mechanisms for the public to be able to obtain, comment and participate in the concessionaire's investment plan.

6.4.9. Tariff

A regulation from the Minister of Home Affairs issued in 2006 (Permen 23) stipulates that “transparency and accountability” are one of the principles of tariff

¹⁴¹⁰ In many instances, the high cost of transaction in making the connection can actually be reduced through public work conducted by the poor themselves.

¹⁴¹¹ Jakarta Water Supply Regulatory Body, ‘Kinerja Operator’

¹⁴¹² Lanti and others, *The First Ten Years of Implementation of the Jakarta Water Supply 25-Year Concession Agreement (1998-2008)*

¹⁴¹³ Interview with Palyja, Jakarta, January 10, 2011

setting.¹⁴¹⁴ It requires tariffs to be ‘affordable’ to those having wages equal to the regional minimum wage or not comprising more than 4% of the monthly average community’s income.¹⁴¹⁵ Permen 23 also stipulates that the calculation and enactment of tariffs must be transparent and accountable.¹⁴¹⁶ “Transparency”, according to Article 7 of the Permen 23 is to be achieved by “*clearly delivering information related to the calculation and enactment of tariffs to stakeholders*” and by “*wholeheartedly capturing stakeholders’ aspirations in connection with the calculation and enactment of tariffs*”.¹⁴¹⁷ “Accountability” in turn, is to be materialised by “*using calculations which can be easily understood and can be justifiable to the stakeholders*”.¹⁴¹⁸

The components of costs¹⁴¹⁹ (including the data to justify such components), types of revenues¹⁴²⁰, types of tariffs¹⁴²¹, steps in calculating tariffs including the procedures and mechanisms for tariff enactment, are all stipulated in Permen 23. The procedures and mechanisms on tariff enactment include the requirement to conduct consultations with customer’s representatives and forums and through various media

¹⁴¹⁴ , *Peraturan Menteri Dalam Negeri No. 23 Tahun 2006 Tentang Pedoman Teknis dan Tata Cara Pengaturan Tarif Air Minum Pada Perusahaan Daerah Air Minum* Article 2.e.

¹⁴¹⁵ Ibid Article 3

¹⁴¹⁶ Ibid Article 7

¹⁴¹⁷ Ibid Article 7.2

¹⁴¹⁸ Ibid Article 7.2

¹⁴¹⁹ Ibid Article 12, 13, 14

¹⁴²⁰ Ibid Articles 15, 16

¹⁴²¹ Ibid Articles 17, 18; It was also revealed on the interview that some customers complained over arbitrary removal from tariff band. *Interview with Non Governmental Organizations, Jakarta, December 20-30, 2010*

in order to obtain their feedback.¹⁴²² This should be done before the proposal is submitted to the mayor/governor.

Unfortunately, a Ministerial Regulation is not considered as a “*Peraturan Perundang Undangan*” under the Indonesian legal system and as such has no binding force in the regions.¹⁴²³ In order to enforce the ministerial regulation, some regions often enact their own by-law and refer to the Permen on the *Konsideraans* part of the by-law.¹⁴²⁴

In Jakarta, presumably because of the Cooperation Agreement, the room for regulating becomes narrower and that leaves the city with a by-law which, after being enacted in 1993, has never been amended or reformed. Regulators and the private sector themselves maintained during interviews that Permen 23 and other guidelines issued by the central government do not apply to the Jakarta concession.¹⁴²⁵ In practice, the governing law on tariff setting in Jakarta is limited to By-laws 11 and 13 and the Governor’s Decision on automatic tariff adjustment.

¹⁴²² , *Peraturan Menteri Dalam Negeri No. 23 Tahun 2006 Tentang Pedoman Teknis dan Tata Cara Pengaturan Tarif Air Minum Pada Perusahaan Daerah Air Minum* Articles 21.2

¹⁴²³ Undang Undang No.10 Tahun 2004 Tentang Pembentukan Peraturan Perundang Undangan

¹⁴²⁴ A regional by-law issued by Bogor Municipality invokes the 1998 Ministerial regulation on tariff setting Peraturan Daerah Kota Bogor No. 4 Tahun 2004 Tentang Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor. *Konsideraans* is a part of a legislation which refers to and cites relevant rules

¹⁴²⁵ Personal Communication, *Field Interview with Palyja, Jakarta, January 10, 2011*

By-law 11 stipulates that the amount of drinking water tariffs shall be determined by the Jakarta Governor,¹⁴²⁶ after being approved by the Ministry of Home Affairs.¹⁴²⁷ The calculation of tariffs is based on the classification of consumers multiplied by the volume¹⁴²⁸ of water used by the consumer.¹⁴²⁹ Details on the cost structure are not known to the public although the component of the water charge¹⁴³⁰ is announced by the regulator. As discussed in the previous section, By-law 11 does not contain any provision on disclosure or public participation on tariff setting. On the contrary, in Bogor, the regional by-law requires tariff setting to be based on the principles of affordability, justice, quality, cost recovery, efficiency, transparency, accountability and conservation.¹⁴³¹

6.4.10.Redress

In By-law 11/1993, other than the consumer's right to ask for examination of a water meter,¹⁴³² the right to complain against inaccurate water metering, the compensation of which, if hard to measure, will be arbitrarily discussed by PAM

¹⁴²⁶ By Law 11/93 Article 16.1

¹⁴²⁷ Ibid Article 16.2 this provision reflects the legal situation before regional autonomy was introduced. Prior to 2001, every regional by-law had to be approved by the central government through the Ministry of Home Affairs, including rules which are politically sensitive, such as determination of water tariffs. After regional autonomy was introduced, this requirement no longer existed. The Jakarta regulator and the private sector maintain that Jakarta is not covered by PP-16 and Water Law 7/2004 and therefore should be covered solely by By-law 11 – which obligates determination of tariffs through the approval of MOHA. This brought confusion and potential legal challenges to tariff decisions.

¹⁴²⁸ Ibid Article 18

¹⁴²⁹ Ibid Article 17

¹⁴³⁰ The formula used in water charge and water tariff is available at JWRSB's website <http://www.jakartawater.org/> (accessed January 5, 2010)

¹⁴³¹ Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor Article 15

¹⁴³² By Law 11/93 Article 20.1

Jaya,¹⁴³³ and the right to object to the Governor against PAM Jaya's penalty decision for some type of violations and 'crimes', there are no references whatsoever to any other redress mechanism. The Governor's Decision on penalty for water theft, according to the by-law, is "binding".¹⁴³⁴ This is actually incorrect since redress to the Courts was, and is, possible through the law on judicial powers.¹⁴³⁵ Failure to clarify access to justice for consumers in By-law 11 is a grave omission. This is contrary to the case of Bogor, which regulates referrals to arbitration and alternative dispute resolution as a redress mechanism.¹⁴³⁶

6.5. Corporate Governance

Two types of companies involved in the water services sector will be evaluated; PAM Jaya: the regional State-Owned Enterprise and PT Aetra and PT Palyja as concessionaires, both privately-owned companies.

PAM Jaya, the owner of Jakarta's water services assets and a party to the concession contract, is a regional-owned SOE established under Regional SoE Law UU No.5/1962. Its corporate governance is regulated under the 1962 act and By-law 13/1992 which also acts as PAM Jaya's statute.

¹⁴³³ Ibid Article 19.4

¹⁴³⁴ Ibid Article 28.3

¹⁴³⁵ Undang Undang Pokok Kekuasaan Kehakiman No. 14 Tahun 1970 Undang Undang Pokok Kekuasaan Kehakiman No. 48 Tahun 2009 When By-law 11/1993 was enacted, Indonesia was under an authoritarian rule and the Court, although available, was not the custom for settling dispute. Access to Court at that time was actually available through Law No. 14 Year 1970 on Judiciary Power (This law has been revoked. The prevailing rule is Law No. 48 Year 2009). Everyone could, in theory, have brought the case to Court if they disagreed with the arbitrary determination by PAM Jaya in compensating its substandard service or by the Governor's decision on water theft penalty.

¹⁴³⁶ Article 22.4, By Law 5 (Bogor)

Palyja and Aetra are both privately-owned companies. Their corporate governance is regulated primarily by UU No. 40 Year 2007 on Corporations. Both have issued bonds which are actively traded on the Indonesian Stock Exchange (IDX). As long as they remain listed in the IDX, they are obligated to comply with capital market regulations, UU No.8/1995, as well as rules enacted by Indonesian Capital Market Supervisory Agency (Bapepam) and the stock exchange rules.¹⁴³⁷ The capital market rule contains a number of corporate governance requirements with which the companies need to comply.

6.5.1. The Board and its accountability

6.5.1.1. Pam Jaya

PAM Jaya's corporate structure comprises of a Board of Directors, a Supervisory Body and an internal audit task force which reports directly to the President Director. Directors are appointed by the Governor.¹⁴³⁸ The Governor can temporarily suspend the directors from their position, but permanent removal must be conducted through an assessment by the Supervisory Body,¹⁴³⁹ which will then

¹⁴³⁷ Palyja and Aetra fit the definition of "Issuer" under UU No.8/1995. UU No.8 in Article 1, para 6 states: "An Issuer is a Person who makes a Public Offering", para. 15: "A Public Offering is an offer to sell Securities to the public, made by an Issuer in ways stipulated in this Law and its implementing regulations" and para 5: "Securities are promissory notes, commercial paper, shares, bonds, evidences of indebtedness, Participation Units of collective investment contracts, futures contracts related to Securities, and all derivatives of Securities".

¹⁴³⁸ By Law 13/92 Article 17.1

¹⁴³⁹ Ibid Article 18

delivers its recommendation to the Governor for a decision. The Governor will have the final say unless the director decides to appeal to the Ministry of Interior.¹⁴⁴⁰

The directors are responsible to the Governor, and must deliver the “profit and loss account” to the Governor, through the Supervisory Body.¹⁴⁴¹ The “profit and loss account” is the only accountability report that the directors need to deliver to the Governor. By-law 13 also contains no obligation of parliamentary supervision. There are no obligations for the Governor to table this “profit and loss account” to the parliament. This weak reporting mechanism is due to Indonesia’s anachronistic regulation on regional SoEs. The primary legislation on SoEs has not been reformed since 1962¹⁴⁴² and the statute governing PAM Jaya has not been reformed since it was enacted in 1993.

The Supervisory Body is chaired by the Governor himself (or a person appointed to represent him)¹⁴⁴³ and its members are appointed from Jakarta’s government officials.¹⁴⁴⁴ The President Director coordinates the Board of Directors and is responsible to the Governor of Jakarta.¹⁴⁴⁵ There is no requirement for the names of the BoD and the Supervisory Board to be disclosed to the public, but since they are appointed by a Governor’s Decision¹⁴⁴⁶, in theory, the document should be in the public domain and the public should have access to their names. In practice, the

¹⁴⁴⁰ Ibid Article 18

¹⁴⁴¹ Ibid Article 39 and 40

¹⁴⁴² Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah

¹⁴⁴³ By Law 13/92 Article 25.1

¹⁴⁴⁴ Ibid, Article 24.1

¹⁴⁴⁵ Ibid, Article 12

¹⁴⁴⁶ Ibid, Article 17.1

names of the directors – but not the members of the Supervisory Body – are available on JWSRB’s website.¹⁴⁴⁷ This is unfortunate since the Supervisory Body is tasked and empowered with the authority to supervise, audit and monitor PAM Jaya and even has the power to request explanations from the directors in all matters related to PAM Jaya’s operations, and in requesting the Directors to be present at their meetings.¹⁴⁴⁸ The Supervisory Body shall conduct meetings once every three months and such meetings should be recorded.¹⁴⁴⁹ There is no obligation that such minutes of meetings should be available to the public, but an FoI request for the minutes is possible.

PAM Jaya’s Directors can be dismissed by the Governor for several reasons, such as when they “act or behave” to the detriment of PAM Jaya, or the Jakarta region or the state.¹⁴⁵⁰ The termination must be preceded with a temporary suspension by the Governor, through a letter stating the rationale of such suspension.¹⁴⁵¹ By-law 13 states that such a letter must be directed to the person being suspended, other members of the Board of Directors and the members of the Supervisory Body. The by-law also regulates that a special session needs to be convened by the Supervisory Body, that the person being suspended be given the opportunity to defend himself and that the Supervisory Body recommend the decision to the Governor, i.e. whether the person shall be terminated or not.¹⁴⁵² The person is given the right to object to the decision to the Minister of Home Affairs, who has the authority to overturn the Governor’s

¹⁴⁴⁷ PAM Jaya, ‘Direksi PAM Jaya’ (*PAM Jaya*,) <<http://www.pamjaya.co.id/Direksi.html>> accessed March 3

¹⁴⁴⁸ By Law 13/92, Article 22

¹⁴⁴⁹ Ibid, Article 23.4

¹⁴⁵⁰ Ibid, Article 18. 2. b and c

¹⁴⁵¹ Ibid, Article 18.3

¹⁴⁵² Ibid, Article 18.4

Decision.¹⁴⁵³ In a case where the decision of the Governor on the suspension is overturned by the Minister, the said director should be publicly rehabilitated.¹⁴⁵⁴

In all stages of suspension, information as to the rationale of suspension and those related to the special session are only disclosed internally among the members of the board of supervisors, The Governor and the Minister of Home Affairs. This is quite understandable since the disclosure of such processes may contradict the ‘presumption of innocence’ principle. The name(s) of the new director, if the suspension is approved, will presumably be made available to the public since such change of directorship needs to be enacted through a Governor’s Decision, which is a public document. There is no obligation to disclose the rationale behind the Governor’s Decision.

PAM Jaya shall deliver its budget plan to the Governor to obtain approval, the Governor is deemed to have approved the plan if, within three months after its submission, he does not express his objections and refusals.¹⁴⁵⁵

By-law 13 also obligates PAM Jaya to deliver its profit/loss account to the Governor, which shall be evaluated by the state auditor or public accountants, based on prevailing accounting rules. The report will be legalised by the Governor once it is audited and such legalisation indemnifies PAM Jaya’s Directors against future liabilities.¹⁴⁵⁶ The regional SOE Law also requires the Governor to appoint an auditor and stipulates that the result of its audits shall be reported to the regional House of

¹⁴⁵³ Ibid, Article 18.4.e

¹⁴⁵⁴ Ibid, Article 18.5

¹⁴⁵⁵ Ibid, Article 38

¹⁴⁵⁶ Ibid, Article 40

Representatives.¹⁴⁵⁷ Furthermore, the state budget law requires the Governor to report regional SOE's financial accounts to the regional parliament, as part of its accountability report.¹⁴⁵⁸

Nevertheless, there is a discrepancy in accounting rules between those required by the regional SOE law and the state budget law. The former is simpler, requiring only a profit/loss account and this is the rule that prevails. Except for some accountability reporting mentioned before, there are no requirements to disclose regional SOEs' annual budget plans or their annual reports in By-law 13 and UU No.5 although this is actually mandatory under the Public Service Law and the FoI Law.¹⁴⁵⁹ There are no other accountability obligations other than what is outlined above. Thus, the Governor's accountability reporting with respect to PAM Jaya is limited only to reporting its profit and loss account, and not towards other aspects such as overall performance or the success of its concession arrangements.

6.5.1.2. Palyja/Aetra

The company organs in Indonesia consist of the General Meeting of Shareholders (GMS), the Board of Directors and the Board of Commissioners.¹⁴⁶⁰ The Corporation Law obligates the Minister of Law and Human Rights to keep the register of companies¹⁴⁶¹, containing information on, inter alia, name and domicile, purpose

¹⁴⁵⁷ Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah Article 27.1

¹⁴⁵⁸ Undang Undang 17 Tahun 2003 Tentang Keuangan Negara

¹⁴⁵⁹ Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik Article 23.4 and Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 9.2 and 9.3

¹⁴⁶⁰ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas, Article 1 para. 2,4,5 and 6

¹⁴⁶¹ Ibid, Article 29.1

and objective and business, activities, period of incorporation, and capitalisation; the Company's full address, data on number and date of the deed of establishment (including its amendments) and the Minister's ratification of the Company and the full names and address of members of the Board of Directors and members of the Board of Commissioners.¹⁴⁶² The Corporation Law obligates that such register of companies "shall be open to the public"¹⁴⁶³ However, the company register is not automatically available in the public domain. In order for a person to obtain information about a company, it must log a request with the Directorate General on General Legal Administration and pay a fee.¹⁴⁶⁴

There is an obligation under the company law for the directors to produce an annual report but these are only delivered to the companies' shareholders.¹⁴⁶⁵ As Palyja and Aetra are listed companies (due to their bond issue), they are obligated to disclose their audited financial accounts annually to the public, through publication in newspapers.¹⁴⁶⁶ However, there is no obligation to disclose their annual report to the public.

Law 40 on Corporations obligates the rules for appointment, replacement and dismissal of members of the Board of Directors and Board of Commissioners to be stipulated in the company's Articles of Associations.¹⁴⁶⁷ Anyone who is capable of performing legal actions is eligible to be appointed except if they, within five years

¹⁴⁶² Ibid, Article 29.3

¹⁴⁶³ Ibid, Article 29.6

¹⁴⁶⁴ Peraturan Menteri Hukum dan Hak Asasi Manusia Nomor M.HH-03.AH.01.01 Tahun 2009

¹⁴⁶⁵ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas Article 66 and 67

¹⁴⁶⁶ Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK) Rule X.K.2

¹⁴⁶⁷ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas, Article 15.f

before appointment, have been declared bankrupt; have been members of a Board of Directors or a Board of Commissioners declared to be at fault in causing a Company to be declared bankrupt, or had been sentenced for crimes which caused losses to the state and/or were related to the finance sector.¹⁴⁶⁸ This requirement, the law suggests, “*is without prejudice to the possibility of the authorised technical agencies determining additional requirements*”.¹⁴⁶⁹ The GMS shall appoint members of the Board of Directors¹⁴⁷⁰ and determine their remuneration.¹⁴⁷¹ Directors can be dismissed at any time by the GMS, through a resolution stating its rationale.¹⁴⁷² Alternatively, the Board of Commissioners may suspend a member of the Board of Directors.¹⁴⁷³ Such suspension must be confirmed or revoked by the GMS within one month.¹⁴⁷⁴ There is no public disclosure rule for change of board members in the Company Law. However, for listed companies, Bapepam Rule XK1 obligates public disclosure and reporting to Bapepam for events, information or material facts, that may reasonably affect the price of securities or investors' decisions such as ‘*a change in control or significant change in management*’¹⁴⁷⁵

The corporation law obligates companies' directors to compile an annual work plan before the start of the new financial year, which should also contain annual

¹⁴⁶⁸ Ibid, Article 83.1

¹⁴⁶⁹ Ibid, Article 83.2

¹⁴⁷⁰ Ibid, Article 94.1

¹⁴⁷¹ Ibid, Article 96.1

¹⁴⁷² Ibid, Article 105.1

¹⁴⁷³ Ibid, Article 106.1

¹⁴⁷⁴ Ibid, Article 106.4

¹⁴⁷⁵ Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK) Rule XK1, Article 2.f.

budgets for companies.¹⁴⁷⁶ These plans must be delivered to the Board of Commissioners and/or the shareholders – depending on the company’s Articles of Association.¹⁴⁷⁷ Annual reports should be delivered within a period of not more than six months after the company’s financial year ends and must contain a financial report and other types of report. The financial report must contain at least the last balance sheet for the financial year just ended in comparison with the previous financial year, a profit and loss statement, a cash flow report, a report on changes in equity and notes accompanying the financial report.¹⁴⁷⁸ There is also an obligation on CSR reporting, a report on the details of problems which arose during the financial year which influences the company’s business activities; a report on the duty of supervision performed by the Board of Commissioners during the financial year just ended; the names of the members of the Board of Directors and members of the Board of Commissioners and salaries and allowances for members of the Board of Directors and salaries or honoraria and allowances for members of the Board of Commissioners of the company for the year just ended.¹⁴⁷⁹

Certain companies, such as those collecting and/or managing public funds, issuing bonds or with assets of more than 50 billion Rupiah¹⁴⁸⁰, must refer their financial report to public accountants to be audited. The law forbids the GMS to ratify

¹⁴⁷⁶ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas Article 63

¹⁴⁷⁷ *ibid* Article 63

¹⁴⁷⁸ *Ibid* Article 66

¹⁴⁷⁹ *Ibid* Article 66

¹⁴⁸⁰ Under this category are if: a. the Company’s business is to collect and/or manage the public’s funds; b. the Company issues acknowledgements of indebtedness to the public; c. the Company is a Public Company; d. the Company is a state-owned liability company; e. the Company has assets and/or a business turnover worth at least Rp. 50,000,000,000 (50 billion Rupiah); or f. it is obligatory under legislative regulations. See *ibid*

the financial report of such companies if it is not audited by public accountants.¹⁴⁸¹ Within seven days of being ratified by the GMS, the law obligates the financial report to be published in one daily newspaper.¹⁴⁸² Members of the Board of Directors and Commissioners are jointly and severally liable to the aggrieved party for any misleading or inaccurate financial report they sign, except if they can prove that such losses is not due to their fault.¹⁴⁸³ During an interview with Palyja, they informed that they deliver an annual report and investment plan to PAM Jaya every three months before year-end, although such is not required by the contract.¹⁴⁸⁴

6.5.2. Related party transactions and conflict of interest

6.5.2.1. PAM Jaya

Under By-law DKI 13/92 and Law 5/1962 on Regional SOEs, family ties among the directors, up to the third degree vertically or horizontally including husband/wife and in-laws, are prohibited.¹⁴⁸⁵ The exception to this rule is only when the ties occur after appointment, the director(s) may continue to hold office after approval by the Governor based on the consideration of the Minister of Home Affairs.¹⁴⁸⁶ Directors are also forbidden from holding another office [at another

¹⁴⁸¹Ibid, Article 68

¹⁴⁸² Ibid, Article 68.4 and 5

¹⁴⁸³ Ibid, Article 69.4

¹⁴⁸⁴ Interview with Mr. Philippe Pedrini, Palyja's Contract Manager, Jakarta, January 10, 2011

¹⁴⁸⁵ By Law 13/92 , Article 16.2, Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah, Article 13.1

¹⁴⁸⁶ By Law 13/92 , Article 16.3, Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah, Article 13.2

institution];neither the Law nor the By-law explains which offices are prohibited.¹⁴⁸⁷ Directors are also prohibited from having a ‘personal interest’ in another business whose purpose is for profit, unless permitted by the Governor.¹⁴⁸⁸ The lack of clarity on what is meant by ‘personal interest’ and ‘another business’ may mean that the directors are barred from activities such as investing in capital markets. The rules for ‘related party’ and ‘double office’ are drafted in the same terms for the Board of Supervisors.¹⁴⁸⁹ However, there is no clause prohibiting them from engaging in business activities. There is no public disclosure rule for potential or manifested conflict of interest.

6.5.2.2. Palyja/Aetra

Regulation on related parties under Indonesian Company Law is weaker than in Victoria or England. The closest to this is the term ‘personal interest’ which appears a few times in the Corporations Law, among others, on the provision regulating the exception towards limitation of legal liability for shareholders.¹⁴⁹⁰ Evidence that directors do not have any conflict of interest in the action of management that causes losses to the company can free the directors from personal liability.¹⁴⁹¹ The members

¹⁴⁸⁷ By Law 13/92 , Article 16.5, Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah, Article 13.4

¹⁴⁸⁸ By Law 13/92 , Article 16.4, Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah, Article 13.3

¹⁴⁸⁹ By Law 13/92 , Article 24

¹⁴⁹⁰ Shareholders are not personally liable for legal relationships entered into on behalf of the Company and are not liable for the Company’s losses in excess of the shares they own except if he/she directly or indirectly exploit the Company in bad faith in his/her personal interest. Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas, Article 3

¹⁴⁹¹ As is commonly found in Corporations Law around the world, directors in Indonesian corporations could be held personally liable – jointly and severally – for the company’s losses, except if they can

of the Board of Commissioners can also be personally liable for actions that causes losses to the companies, unless they can prove, among others, that they *do not have any direct or indirect personal interest* in the actions of management of the Board of Directors which caused the losses.¹⁴⁹² Existence of a conflict of interest bars the directors from representing the company in or out of court.¹⁴⁹³ There are no public disclosure requirements for related parties and related party transactions under the company law.

The Capital Market Law UU No. 8/1995 does not provide any definition of ‘conflict of interest’, however, it defines ‘affiliation’ and obligates some reporting and disclosure on their transactions. Affiliation is defined as “*a family relationship by marriage and descent to the second degree, horizontal as well as vertical; a relationship between a Person and its employees, directors, or commissioners; a relationship between two Companies with one or more directors or commissioners in common, a relationship between a Company and a Person that directly or indirectly, controls or is controlled by that Company*”.¹⁴⁹⁴ Rule IXE1 of the Bapepam LK

prove that the losses were not caused through their fault or negligence, that they carried out the management in good faith and with prudence in the interests of and in accordance with the purpose and objectives of the Corporation, that they do not have a direct or indirect conflict of interest in the action of management that caused the losses; and that they took action to prevent the losses from arising or continuing. This provision exempting the directors from liabilities is cumulative, which means that all of its elements have to be fulfilled. This does not prevent other members of the board of directors and commissioners from filing suit on behalf of the company. Ibid, Article 97

¹⁴⁹² Ibid, Article 115.5.b. The conditions so that they can be exempted from personal liability are cumulative: a. they have carried out their supervision in good faith and prudence in the interests of the Company and in accordance with the Company’s purpose and objectives; b. they do not have any direct or indirect personal interest in the actions of management of the Board of Directors which caused the losses; and c. they have given the Board of Directors advice to prevent the losses arising or continuing.

¹⁴⁹³ Ibid, Article 99.2

¹⁴⁹⁴ Undang Undang No. 8 Tahun 1995 Tentang Pasar Modal Article 1.1

(Capital Market Supervisory Agency) however defines ‘conflict of interest’ as “*a difference between the economic interests of a Company and the personal economic interests of the director, commissioner, or the major shareholder of the Company in a Transaction that may inflict financial loss upon the Company because of unfair pricing*”¹⁴⁹⁵ The rule is subject to some exception, for example, if the subsidiary is 99% percent owned by the parent company.

Affiliated transactions (subject to some exceptions) have to be notified to Bapepam LK and disclosed to the public within two working days after they occur, accompanied by some explanations, *inter alia*, the justifications for commencing such transactions, the report from independent appraisal and the identities of the parties involved.¹⁴⁹⁶ Transactions with conflict of interest (subject to some exemptions) must be approved by independent shareholders¹⁴⁹⁷ in a general meeting of shareholders and confirmed in notarial deeds. The notice of GMS must contain information on the object, value, parties, nature of conflict of interest, appraisal report concerning the transaction involved¹⁴⁹⁸ and must be delivered through registered mail or fax in addition to newspaper announcements.¹⁴⁹⁹

¹⁴⁹⁵ Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK) Rule IXE1 Article 1.e

¹⁴⁹⁶ Ibid Rule IXE1 para 2 (Latest amendment 25 Nov 2009)

¹⁴⁹⁷ Ibid Rule IXE1, Article 1.f: Independent shareholders are the shareholders who do not have any Conflict of Interest with respect to a particular Transaction and or who are not an affiliated Party of the director, the commissioner, or the substantial shareholders that have a Conflict of Interest on certain Transaction.

¹⁴⁹⁸ Ibid Rule IXE1, para 4.f

¹⁴⁹⁹ Ibid Rule IXE1, para 4.f

The purpose of this Bapepam LK rule is to provide room for the independent shareholders to voice their objections against transactions which may be detrimental to their investment value at the company. Independent shareholders have an economic interest that the company engages in fair transactions, and that the benefits from the transactions are passed onto them in the form of higher share value. In water utilities' regulation, consumers (and potential consumers) also benefit from the utility's arms-length transactions as its benefits can be reflected in lower tariffs or taxes. However, unlike the English regulatory accounts¹⁵⁰⁰ and licence condition,¹⁵⁰¹ the Bapepam LK Rule does not explicitly require the company to engage in an arm's length manner. What it regulates is if the transaction(s) inflict financial loss on the company (the definition of CoI above) and hence is detrimental to independent shareholders.¹⁵⁰² Insofar as independent shareholders approve such a transaction (presumably since they are compensated) nothing prevents that transaction from occurring, although such transactions would be detrimental to consumer.

¹⁵⁰⁰ , *Guideline for transfer pricing in the water industry; Regulatory Accounting Guideline 5.04* also Ofwat, *Chapters 30 & 31: Transactions with Associated Companies, June return reporting requirements and definitions manual 2011, Issue 1.0 - January 2011*

¹⁵⁰¹ For example, *Instrument of Appointment by the Secretary of State for the Environment of Severn Trent Water Limited as a water and sewerage undertaker under the Water Act 1989* Condition F para 6.1. "The Appointee shall ensure that every transaction between the Appointed Business and Associated Company (or between the Appointed Business and any other business or activity of the Appointee) is at arm's length, so that neither gives to or receives from the other any cross-subsidy.. In the Indonesian case, receiving cross subsidy would be allowed.

¹⁵⁰² The author would like to thank Pramudya Oktavinanda for the discussion on the interpretation of Bapepam Rule IX.E.1

Company law requires companies to draft their financial account *based on the generally accepted accounting standard*.¹⁵⁰³ The linkage between accounting standards and company laws are weak as, unlike Victoria¹⁵⁰⁴, there is no direct mandate under company law that a particular body should enact and safeguard accounting standards with which companies must comply.¹⁵⁰⁵

The accounting standards, known as PSAK, require the disclosure of related parties.¹⁵⁰⁶ Aetra report its related party transactions in its financial account, specifying the identities of the parties, their relationship with the company, the amount of the transaction and its nature¹⁵⁰⁷ and this is published on its website. Palyja, however, only publishes its consolidated account¹⁵⁰⁸ and there is only one line mentioning receivables to related parties.

The Jakarta Cooperation Agreements provides flexibility for the concessionaires to arrange procurements with third parties. There is a general obligation to enter into fair, transparent and competitive procurement procedures under the contracts but this is not enumerated in more detail. Palyja commented that

¹⁵⁰³ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas Article 66 (3). Elucidation of Article 66 (3) refers to accounting standards issued by the Indonesian Association of Accountants.

¹⁵⁰⁴ See s.334 Australian Accounting Standards Board, *AASB 124, Related Party Disclosures*

¹⁵⁰⁵ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas Article 66 (3) and Elucidation of Article 66 (3). In addition, in compliance with Article 66(3) it carries no liability, except if they mislead or misreport their financial account (See Article 69 (3))

¹⁵⁰⁶ Ikatan Akuntan Indonesia, *Pernyataan Standar Akuntansi Keuangan (PSAK) No. 07: Pengungkapan Pihak Pihak Berelasi* (2010)

¹⁵⁰⁷ PT Aetra Air Jakarta, *Financial Statement, December 31, 2010 and 2009* (2010) Schedule 5

¹⁵⁰⁸ PT PAM Lyonnaise Jaya, *Laporan Keuangan* (2011)

they have their own internal procurement rule from Suez GDF.¹⁵⁰⁹ Such a rule, if it exists, could be helpful in promoting efficient competition, but without sufficient regulation on procurement, its enforcement depends entirely on the utilities' discretion.

Given such regulatory structures, utilities procurement in Jakarta is not sufficiently regulated. Capital market rules obligate public disclosure and reporting to Bapepam for some affiliated transactions,¹⁵¹⁰ but this reporting rule occurs *ex post facto* (two working days after it occurs). Conflict of interest transactions obligate the approval of independent shareholders and requires disclosure through a GMS mechanism specifying the details of the intended transaction.¹⁵¹¹ This requirement requires *ex-ante* disclosure but unfortunately is not applicable to Palyja and Aetra since they only list their bonds in the capital market and not their shares.

Capital market disclosure rules are, therefore, only applicable conditional upon the type of instruments traded in the capital market; some disclosure rules – such as that requiring approval of independent shareholders and disclosure on the nature of the transaction to be approved – are applicable to listing of shares, but not for bond issue. The rules are also applied incidentally. Palyja and Aetra will be bound by disclosure rules as long as their bonds are still listed on the market. Once all of their bonds are matured, they will no longer be obligated to adhere to the rules. Responding to this possibility of a regulatory vacuum following the delisting of bonds, a proponent of private sector participation commented that more permanent regulation should be

¹⁵⁰⁹ Personal Communication, *Field Interview with Palyja, Jakarta, January 10, 2011*

¹⁵¹⁰ Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK) Rule IX.E.1 para 2.a

¹⁵¹¹ *Ibid* Rule IX.E.1 para 3

emphasised by the state.¹⁵¹² Indeed, the capital market rules cannot be relied on to promote transparency without any additional utility regulation mechanism. In the UK, OFWAT utilises the capital market rule to promote disclosure by obligating utilities to adhere to it, irrespective of whether their shares or bonds are being traded (See section 5.4.3 above).

6.5.3. Corporate restructuring

6.5.3.1. Pam Jaya

PAM Jaya's initial composition of capital is determined by By-law 13/92.¹⁵¹³ There is no publicly accessible information as to whether PAM Jaya has ever raised its capital after its inception. By-law 13 does not stipulate that its capital is comprised of shares, hence, there is no issue about the identity of shareholders. All capital belongs to the regional government.¹⁵¹⁴

By-law 13 does not regulate any provision on company restructuring, however, the Law on Regional SOE¹⁵¹⁵ contains provisions on transfer of ownership and liquidation, but nothing on acquisition. Transfer of ownership of a Regional SOE under the law, interestingly, is only allowed to be conducted by cooperatives and not other legal entites.¹⁵¹⁶ Although the law does not provide any explanation on this restriction, it can be seen that the political situation in 1962 and the spirit of Law No.5

¹⁵¹² Interview with Gerard Payen and Jack Moss of Aquafed, Jakarta, January 28, 2010

¹⁵¹³ By Law 13/92

¹⁵¹⁴ Ibid, Article 8.1

¹⁵¹⁵ Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah

¹⁵¹⁶ Ibid, Article 28.3 The article talk about transfer of entire ownership, not just a percentage of shares

was to curtail Western style corporate capitalism. The elucidation of Law No.5 clearly stipulates that the focus of Law No.5 shall be the development of the regions based on the principles of “Guided Economy”¹⁵¹⁷ and that this is reflected in the special position of the cooperatives.¹⁵¹⁸ Whether or not the political jurisprudence of 1962 is applicable to the current legal regime is a matter of debate. On a practical level, however, it is clear that PAM Jaya’s shares can only be transferred to cooperatives and not corporations. The Regional SoE Law does not regulate transparency mechanisms on share transfers or liquidation.

6.5.3.2. Palyja/Aetra

The merger of a company requires the approval of the GMS of a Merger Plan, containing the name, domicile of the company, procedures for share valuation, financial report and methods of settlements for the BoDs and BoCs and non approving shareholders.¹⁵¹⁹ There is no public disclosure requirement in corporation law. For listed companies, however, there are reporting and public disclosure obligations for mergers. A detailed *merger plan* for listed companies must be delivered to the company’s shareholders, 28 days prior to the GMS approving the merger.¹⁵²⁰ An

¹⁵¹⁷ One of Indonesia’s Founding Fathers, Mohamad Hatta, explained: “The basis of the people’s economy must be a common endeavor, which is implemented through the familial principle. What is meant by common endeavor based on familial principle are cooperatives. Cooperative of the Indonesian style, which provides the economic side to the old cooperative: ‘Gotong Royong’.” Hatta, *Tafsir Ekonomi Terpimpin* (Interpretation towards ‘Guided Economy’), Djambatan, Jakarta, 1967

¹⁵¹⁸ Elucidation of Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah, Preamble. See also elucidation of Article 28

¹⁵¹⁹ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas, Article 123

¹⁵²⁰ Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK) Rule IX.G.1

abridged *merger plan* must be publicly disclosed through two daily newspapers.¹⁵²¹ Companies are obligated to report to Bapepam LK (the capital market supervisory agency) on the occurrence of a merger within two days of it taking place.¹⁵²² Similar rules apply for acquisition of shares, if conducted by a legal entity, but not if the acquisition is done by natural persons.¹⁵²³ The tender offer rule, which also contains some disclosure requirements, could also be applicable to some types of acquisitions, but is nevertheless not applicable to both Palyja and Aetra since only their bonds and not their shares are listed on the capital market.

The acquisition of TPJ (the former name of Aetra) by a Singaporean consortium involved various layers of ownership and the use of Special Purpose Vehicles (see section 6.1.2.2 above).¹⁵²⁴ PAM Jaya has the ability to block the acquisition if it involves more than a 51% transfer of shares to third parties.¹⁵²⁵ The layers of SPVs caused the ownership structure to become obscured. It is not likely that PAM Jaya and the Jakarta Government were finally able to obtain all the detailed information concerning the new owner. The assurance only came in the form of a “legal opinion” from the buyer’s lawyers, which certified the link between the

¹⁵²¹ IbidRule IX.G.1

¹⁵²² IbidRule XK1

¹⁵²³ Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas, Article 125

¹⁵²⁴ The ultimate owner of Aetra through Aquatico is said to be Recapital Advisors (80%) and Glendale Partners (20%). Both companies own Aquatico through layers of Special Purpose Vehicles (SPV): Arrosez (Recapital) and Praeo (Glendale), both of which are a British Virgin Island SPVs. Sawitri, ‘Committee questions Aquatico’s suitability as tap water operator’ Sawitri, ‘Regulatory body casts doubt on takeover bid’

¹⁵²⁵ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 7.2.a (iii) also Lanti and others, The First Ten Years of Implementation of the Jakarta Water Supply 25-Year Concession Agreement (1998-2008) and Ardhianie, Kontroversi Penjualan PT Thames Pam Jaya (TPJ)

acquirer and its ultimate owners. This is different from the UK regulatory practice of securing legally enforceable undertakings from the utility's UK holding company.¹⁵²⁶

The Board of Directors is obliged to keep a register of shareholders encompassing their names and addresses, including the detail of shares registered and change of share ownership.¹⁵²⁷ Corporation Law UU No. 47 does not obligate the public disclosure of such a register. There is an obligation under Capital Market Law UU No.8/1995 for shareholders owning 5% or more shares and for directors and commissioners owning shares in the company to report their share ownership and its changes.¹⁵²⁸

There is no requirement to disclose existing ownership and shareholders' rights to the public under the Cooperation Agreement and the Jakarta Governor decree regulating the concession. Even today, the regulator has inadequate information as to the actual ownership of Aetra, other than what is clarified by the "legal opinion".

6.6. Passive Disclosure Rule

6.6.1. Applicability of FoI Act to institutions involved in water services

1526 Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Condition P

1527 UU No.40/2007, Article 50.1.b regulates the detail of the number, serial number, and date of acquisition of shares held by shareholders and their classification in the event that more than one classification of shares has been issued, the amount paid up on every share, the name and address of an individual or legal entity who has a pledge over the shares or is the recipient of fiduciary security over shares and the date of acquisition of the pledge or registration of the fiduciary security

1528 Undang Undang No. 8 Tahun 1995 Tentang Pasar Modal Article 87

Indonesian FoI Law, UU No.14/2008 is applicable to public bodies, which are defined as:

*“any branches of the executive, legislative and judiciary as well as other bodies whose functions and main tasks are related to the organization of the state, whose funds are derived partially or in entirety from the state and/or regional government’s budget, or non-governmental organizations insofar as part or all of its budget is derived from the state or regional government’s budget, community’s contribution and/or foreign funds”.*¹⁵²⁹

It is thus quite clear that FoI Law UU No.14/2008 is applicable to all governmental bodies, including those involved in regulating water services such as the Department of Public Works, the National Planning Agency, Jakarta regional government and the Governor and the Ministry of Environment. What about the Jakarta Water Sector Regulatory Body (JWSRB)?

Being an entity set up by a contract¹⁵³⁰, the JWSRB claim that they are neither a branch of the executive, legislative nor the judiciary. They consider themselves a private body or, at the very least, a non-governmental organisation.¹⁵³¹ The JWSRB does regularly receive its funding directly from the collection of water tariff and not

¹⁵²⁹ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 1(3)

¹⁵³⁰ Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 51

¹⁵³¹ Al'Afghani and others, *Transparansi Lembaga-lembaga Regulator Penyediaan Air Minum Di DKI Jakarta* See box 1 “Status BR PAM Sebagai Badan Publik” (Status of JWSRB as Public Body) summarizing field interviews with members of the regulatory body. If they are categorized as an NGO under the Indonesian FoI Law, they will be subject to lesser disclosure requirements.

the state budget. It is also questionable if the JWSRB's *present*¹⁵³² functions in mediating disputes, supervising the contract and developing consumer dispute mechanisms, would categorise it as a Public Body. However, its *future*¹⁵³³ functions in preventing the misuse of dominant position, protecting consumer interests and ensuring sustainability of water supplies are much more manifest in reflecting public functions.

It is also important to note that JWSRB's *present* functions, although not yet enabled by legislation, are enabled by a Governor's Regulation.¹⁵³⁴ The Regulation established that the members of JWSRB are appointed and removed by the Governor. Hence the JWSRB is accountable to the Governor and PAM Jaya and, in turn, the Governor is accountable to the local parliament. JWSRB's regulatory function forms a part of the Governor's accountability to the local parliament, as a direct accountability line between JWSRB and the parliament does not exist.

Moreover, the rationale of the Governor's Regulation is not only in materialising the contract but also in protecting the greater public interest which exists independently from the contract. This is well reflected in the preamble of the

¹⁵³² See JWSRB's "Present" Functions under Clause 51.1: coordinating governmental entities and conducting a supervisory role in the enforcement of the contract, closure of deep wells, tariff levels, enforcement of PAM Jaya's rights and in developing consumer dispute mechanisms and in mediating disputes between PAM Jaya and its concessionaires.

¹⁵³³ The contract at Clause 51.2 stipulates that the parties intended that JWSRB shall have the functions of preventing the misuse of dominant position, protecting consumer and community interest in terms of charges and service levels, ensure that customers benefit from improved efficiency as well as ensuring "the provision of an efficient and economically sustainable water supply". All of these functions have to be enabled by legislation. These have not materialised up to now. Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001

¹⁵³⁴ Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum

Governor's Regulation which cites various legislations, including the laws on regional autonomy, the competition law and the law on consumer protection.¹⁵³⁵ The Regulation also clarifies the purpose of the establishment of JWSRB, which is to safeguard the implementation of the concession contract in accordance with principles of transparency, justice and accountability and in guaranteeing service levels and affordability.¹⁵³⁶ These aspects may give weight to the arguments that JWSRB is a public body. However, the Governor Regulation is by no means an adequate legal framework as it does not have much compelling power compared to legislation.¹⁵³⁷ Thus, the question of whether or not JWSRB is a Public Body will have to wait until a case is lodged with the FoI Commission.

6.6.1.1. Applicability of the FoI Law to SOEs

Whether or not an SOE should be covered by the FoI Law was one of the central issues debated in the parliament during the enactment process of the FoI Law. The government draft of the FoI Law did not include SOEs in the definition of 'Public Body' (although the parliament's draft did)¹⁵³⁸ for the reason that the separation of assets in an SOE reflects the transformation of such entity from public into private. The remaining public component in an SOE, the government maintained, is the portion of fund used for *Public Sector Obligation* or PSO.¹⁵³⁹ Secondly, according to

¹⁵³⁵ Ibid See Preamble para 1-12

¹⁵³⁶ Ibid

¹⁵³⁷ Undang Undang No.10 Tahun 2004 Tentang Pembentukan Peraturan Perundang Undangan

¹⁵³⁸ Komisi Informasi Pusat Republik Indonesia, *Anotasi Undang Undang Nomor 14 Tahun 2008 Tentang Keterbukaan Informasi Publik* (1st edn, Indonesian Center for Environmental Law dan Yayasan Tifa 2009)

¹⁵³⁹ Ibid p.32-33

the government, an SOE must comply with various public sector rules, such as the laws on state budget, state finance, state auditor, corporation law, capital market law, etc., which make them more transparent than the private sector.¹⁵⁴⁰ The Government's arguments appear to be unsound as, on the one hand, they maintain that the separation of assets means that SOEs are governed by purely 'private' rules and, on the other hand, that SOEs are already transparent since in addition to being governed by 'private' rules, the SOE is also regulated by the rules on public sector.

The parliament's draft which explicitly included 'SOE' in the definition of 'public bodies' did not make it to the final reading and the agreed formulation of Article 1 (3) is what is mentioned in the beginning of this chapter. The final draft of Article 1 (3) contains the phrase "*whose funds are derived partially or in entirety from the state and/or regional government's budget*" which nevertheless could be interpreted to cover SOEs. Even though the term 'SOE' is missing in Article 1 (3) in the definition of a public body, Article 14 of the FoI Law specifies the list of information which must be published by an SOE: among others, its financial and annual report and the remuneration system of its executives.¹⁵⁴¹

With this interpretation, there should be no debate that all SOEs, owned by both central government and regional government such as PAM Jaya, which were set up under UU No.5/1962¹⁵⁴², fall under the definition of 'public body' under Article 1 (3) of the Indonesian FoI Law. In addition, the Indonesian Information Commission

¹⁵⁴⁰ Ibid p. 32-33

¹⁵⁴¹ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 14

¹⁵⁴² Undang Undang No.5 Tahun 1962 Tentang Perusahaan Daerah

Rule 1/2010 listed “Perusahaan Daerah Air Minum” (Regional Waterwork Companies) as a Public Body covered by the FoI.¹⁵⁴³

In practice, however, this can be problematic. Some lawyers admitted the applicability of the Indonesian FoI Law on the one hand, but argue that such applicability precludes information which is generated by the SOE in its dealings with the private sector as they should be entirely governed by ‘private’ rules. This was argued in *Lembaga Penelitian Aplikasi Wacana (“Applicant”) vs PT Blora Patragas Hulu (“Respondent”)* concerning the disclosure of a Cooperation Agreement concluded between the Respondent and a private entity (“BHP”).¹⁵⁴⁴ BHP was one of the very first cases adjudicated by the Indonesian FoI Commission.

The applicant, Lembaga Penelitian Aplikasi Wacana, a research NGO, sought to disclose the cooperation agreement between the Respondent, an SOE owned by Blora regional government PT Blora Patragas Hulu, and PT Anugrah Bangun Sarana Jaya (ABSJ), a purely private entity which manages 21% of the Respondent’s participating interest in Cepu oil and gas block.

The applicant required the cooperation agreement in order to provide input to the Blora regency and regional house of representatives on the plan to divest 49% of Blok Cepu’s participating interest to ABSJ. The respondent rejected the request to disclose the contract on several grounds, among others, that: (1) the obligation to disclose agreement with third parties under the Indonesian FoI Law does not apply to

¹⁵⁴³ Attachment I of Indonesian Information Commission Rule 1/2010, para.G

¹⁵⁴⁴ LPAW vs BHP, Keputusan Komisi Informasi Pusat No 001/VII/KIP-PS-A/2010, October 7th, 2010

them¹⁵⁴⁵ and that only certain obligation of disclosures for SOEs are applicable¹⁵⁴⁶ (2) the Cooperation Agreement between Respondent and ABSJ is a trade secret¹⁵⁴⁷ (3) disclosure of Cooperation Agreements are exempted by the Indonesian FoI Law as “*Information which shall not be disclosed pursuant to legislations*”¹⁵⁴⁸, (4) the Applicant is not a party to the concession contract and therefore has no legal standing to request the contract document, (5) based on the *Pacta Sunt Servanda* principle under Indonesian Civil Code¹⁵⁴⁹, the agreement shall be perceived as the *lex specialis* to the disclosure obligation arising under Indonesian FoI Law, (6) the Cooperation Agreement between Respondent and ABSJ is regulated under Book III of the Indonesian Civil Code and is not regulated by the Indonesian FoI Law, hence the Indonesian FoI Commission has no authority to adjudicate the case (7), the Criminal Code at Article 322 (1) restricts public officials in disclosing secrets, (8), the Corporations Law at Article 97(3) hold directors liable for the losses sustained by the company, hence the Respondent’s directors are justified in not disclosing the information, (9) by withholding the information, the respondent’s Directors are acting

¹⁵⁴⁵ This is despite the fact that Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 11.e stated that: “*Public Bodies are obligated to provide information which should be available at all time, which covers ... The agreements entered into with third parties*”

¹⁵⁴⁶ Ibid, Article 14 lists types of information which should be disclosed by regional SOEs and SOEs owned by the central government, among others, results of audit by external auditors, credit rating agencies, remuneration system for directors and commissioners and procurement mechanisms, but there is no obligation to disclose agreement with third parties under Article 14. The relation between Article 11.e and Article 14 under the Indonesian FoI Law is not clearly established. It is possible to argue that Article 11.e covers the disclosure obligation for all public bodies (including SOEs) whereas Article 14 lists the additional obligation for SOEs. See also the parliamentary debate on the definition of ‘public body’ under Section 5.1.a above

¹⁵⁴⁷ Ibid, Article 17.b protects trade secrets

¹⁵⁴⁸ Ibid, Article 17.j. The applicant does not detail which Indonesian legislations forbids the disclosure of contracts

¹⁵⁴⁹ Indonesian Civil Code, the "Burgerlijk Wetboek" Article 1338

pursuant to the Business Judgment Rule as regulated by the Indonesian Company Law.¹⁵⁵⁰

The Indonesian FoI Commission eventually rejected all the Respondent's arguments and decided the case on behalf of the Applicant. It decided that (1) regional SOEs are "Public Bodies", and as a public body they must publish their contracts with third parties and that (2) the Respondent can only reject the request for disclosure if the information is allowed to be exempted. The FoI Commission made no detailed remarks about the applicability of FoI rules on private arrangements and whether the Respondent's argument about the contract being regarded as a trade secret is justified.

The above arguments from the Respondent illustrate how the blurring between public and private in the provision of public service is not completely resolved under the Indonesian legal system. The Indonesian FoI Law, by obligating public bodies to publish its agreement with third parties¹⁵⁵¹, has actually moved towards regulating the accountability of public services which are delivered through private sector participation. This, unfortunately, is not adequately followed by reforms in other legislations.

A clear example of this trend is the recently enacted Public Service Law.¹⁵⁵² The Law imposes tough sanctions on government officials, such as removal from

¹⁵⁵⁰

¹⁵⁵¹ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 11.e : "*Public Bodies are obligated to provide information which should be available at all time, which covers The agreements entered into with third parties*"

¹⁵⁵² See also Al'Afghani, M.M., 'Can public service law be applied to private sector?' *The Jakarta Post* (Jakarta, July 14th, 2009) <<http://www.thejakartapost.com/news/2009/07/14/can-public-service-law-be-applied-private-sector.html>> accessed February 20, 2010

office¹⁵⁵³ or termination of employment,¹⁵⁵⁴ including compensation to victims.¹⁵⁵⁵ The only sanctions possible for 'privatised' undertakers are the suspension or revocation of licence.¹⁵⁵⁶ Whereas some of the sanctions for government officials above can be rendered by their superior officers or the government department in charge of state employee, the Public Service Law is not clear on which authority can issue sanctions to private undertakers. In addition, licence management (suspension, revocation, annulment) by the government is likely to be the last resort since such revocation or suspension carries important economic and political ramifications, especially if the company is considered to be a revenue-generating and employee-absorbing industry.

To make matters worse, licence management is also inextricably linked to other forms of foreign investor remedy. Intervention from central government and the transaction cost of international arbitration would sufficiently deter regional governments from suspending or revoking licences. This has been proven true on the case of Jakarta Water Concession and enforcement of water pollution problems.¹⁵⁵⁷ What is required, therefore, is another form of legal accountability which makes private undertakers directly liable and responsible for violation of public service.¹⁵⁵⁸

¹⁵⁵³ Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik Article 54.3

¹⁵⁵⁴ Ibid Article 54.8 and 54.9

¹⁵⁵⁵ Ibid Article 55.3

¹⁵⁵⁶ Ibid Article 54.20 and 54.11

¹⁵⁵⁷ Bedner, 'Consequences of Decentralization: Environmental Impact Assessment and Water Pollution Control in Indonesia'

¹⁵⁵⁸ This is contrary to what happened in England. In England, the move toward privatisation has triggered reactions in the form of protection of public service. See Prosser, 'Public service law: privatization's unexpected offspring'. Indonesia is the opposite. It has just started to make the government accountable, after being exposed to a dictatorial regime for more than 30 years. However,

This would require either the strengthening of regulatory institutions such as JWSRB (as well as equipping them with quasi-judicial powers), empowering the ombudsman¹⁵⁵⁹ with sanction-making power or enlarging the scope of the Administrative Court's Decision.¹⁵⁶⁰ Only then, can the lacunae in legal remedies which results from the delegation of public service law to private actors be resolved. Such a mechanism will also tie transparency mechanisms under the FoI Law to a broader accountability regime.

6.6.1.2. Applicability of FoI Law to Palyja and Aetra

Are Palyja and Aetra “Public Bodies” under Indonesian FoI Law? This question can be approached from two directions. Firstly, by interpreting the part of

the state is gradually (and partially) in ‘retreat’. The Public Service Law was drafted to make the government accountable, but is not tailored to make delegation of public service accountable. The law is unprepared to accommodate accountability in a regulatory state.

¹⁵⁵⁹ The state can empower the regional ombudsman to directly impose sanctions, but unlike regulators, the ombudsman lacks specific knowledge of the industry.

¹⁵⁶⁰ Another scenario would be instituting the High Court to act as a super-regulator, but this would require a reform of the Law of Administrative Court that enables them to impose remedies in the form of issuing penalties without dwelling on an ‘administrative decision’. At present, the Administrative Court can only decide that a case be rejected, proven, dismissed or declared as lapsed. See Undang Undang No. 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara (Law on Administrative Court or “LOAC”) Article 97.7 and Bedner, *Administrative courts in Indonesia: a socio-legal study* p. 128, also the discussion in section 5.4.8.2.3 above. When a case is proven, the only remedy would be one of the following “*rescission of the litigated administrative decision, the issuance of an administrative decision in case of a constructive refusal or the rescission of the litigated decision and the issuance of a new decision*” *ibid* section 19, p. 128. See LOAC Article 97.9. A plaintiff can only obtain a financial remedy when the court decides the case to be ‘proven’ and subsequently ordered the legal fate of an ‘administrative decision’ as mentioned above, accompanied by a form of compensation (See LOAC, Article 97.10). If the claim is unrelated to an administrative decision or a presumed administrative decision, then there is no room for financial penalty.

Article 1(3) of the FoI law which reads “ *or non governmental organizations insofar as part or all of its budget is derived from the state or regional government’s budget, community’s contribution and/or foreign funds*”¹⁵⁶¹ and secondly, by looking at Palyja and Aetra as a private entity exercising governmental functions through the concessions.

6.6.1.2.1. Nature of the budget

One method for applying administrative law to private entities is by looking at the origins of its financing. If an entity is financed partly or entirely through public funds, it may provide justifications for state bodies, such as the state audit body and the ombudsman, to exert its authority on the entities. Article 1(3) of the Indonesian FoI law provides that the Law is applicable to “*non governmental organizations insofar as part or all of its budget is derived from the state and/or regional government’s budget, and contribution from the community, and/or foreign sources*”.¹⁵⁶²

In the Jakarta concession system, PAM Jaya pays Palyja and Aetra based on the volumetric water sold to consumers multiplied by an indexation formula linked to other things such as exchange rate and inflation rate (“water charge”). If the tariff charged to consumers is unable to meet the water charge, PAM Jaya still needs to pay the remaining “shortfall”. If the payment of shortfall is made through the regional government’s budget, the FoI Law would apply. This would be a rare situation since PAM Jaya still owes the concessionaires a large amount of debt and any payments are

¹⁵⁶¹ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 1(3)

¹⁵⁶² Ibid, Article 1(3)

made by offsetting PAM Jaya's debt with the concessionaire's penalty (see section 5.4.8.2.3, the "Cooperation Agreement" above).

Using the budget as a means of categorising an entity as a 'public body' faces some other challenges. It brings about several technical questions of amount, time-frame and applicability to types of information.

During the parliamentary debates, the government was cautious on how this article will be applied and queried whether entities with only minuscule financing from the public should be covered by this provision. This also sparks another question: when the entity is no longer covered by public funds, will it still be listed as a public body? If the answer is no, there is then a question of time-frame: at which point in time will the FoI law be applicable to the entity, when they are receiving public funds? State budget funds could be disbursed for only one time, but used over a period of time. Finally, if the entity also operates commercially, using private funds, some information that it generates, in theory, results purely from private financing. The FoI law may not be applicable to this information. The law is silent with respect to the hybrid function of these entities and how the FoI Law can apply to that situation. Due to difficulties in categorising which information is derived from which funds, we can assume that once an entity becomes a public body, the FoI Law will be applicable to all sorts of information that it generates, whether it is related to the use of public funds or not.

Furthermore, there is also confusion on what "*non governmental organization*" really meant; does it cover only NGOs in the commons sense of the term or also corporations and other private entities? KIP regulation lists a number of 'public bodies' to which the Indonesian FoI Law would be applicable. PDAM (State-owned regional water companies, PAM Jaya is also in this category) is listed as a Public Body, however, its concessionaires are not. The KIP regulation does not

overrule the possibility that other bodies not listed on the attachment of its rule can still be covered.¹⁵⁶³

At the time of writing, there has been no clarity on whether the proportion of public funds on the entities budget matters for the determination of such entity as a public body. The KIP regulation is silent on this matter and no case has been submitted to them which deal with such an issue.

6.6.1.2.2. **Nature of the *concession***

Adapted from continental Europe's administrative legal tradition, Indonesian doctrines in Administrative Law recognise several kinds of 'licences' that would allow the private sector to be involved in public service: *Dispensasi* (dispensation), *Lisensi* (licence, and *Konsesi* (concession).

Atmosudirjo wrote that a concession is "*suatu penetapan administrasi negara yang secara yuridis sangat kompleks karena merupakan seperangkat dispensasi-dispensasi, izin-izin, lisensi-lisensi, disertai pemberian semacam "wewenang pemerintahan" terbatas kepada konsesionaris*" ("an administrative decision which is legally very complex as it contains a set of dispensations, permits and licences followed by some kind of limited "governmental authorities" to the concessionaires)

¹⁵⁶³ Institutions, entities or organisations which fulfil the criteria of the Indonesian Freedom of Information Law but are not yet listed as a Public Body under the attachment of this rule will still be considered as a Public Body under the Indonesian FoI Law." "Lampiran I ttg Badan Publik Peraturan KI Nomor 1 Tahun 2010, para.H.

¹⁵⁶⁴ Since concessionaires hold some form of governmental powers, some authors¹⁵⁶⁵ even consider them to be “public officials” (See section 6.4.2).

Since Palyja has been granted a monopoly to provide water to western Jakarta, and Aetra to the eastern part, together with the power to collect tariffs and decide on matters such as investment, network expansion and the connection and disconnection of customers from the water network, they are exercising a delegated governmental authority in the water services sector.

Article 1(3) of the Indonesian FoI Law defines a Public Body as: “*any branches of the executive, legislative and judiciary as well as other bodies whose functions and main tasks are related to the organization of the state, whose funds are derived partially or in entirety from the state and/or regional government’s budget*”.¹⁵⁶⁶ Both Palyja and Aetra could fit under the part “*as well as other bodies whose functions and main tasks are related to the organization of the state*” as their main function is to deliver water services on behalf of the regional government.¹⁵⁶⁷

¹⁵⁶⁴ Atmosudirdjo, *Hukum administrasi negara* p.98

¹⁵⁶⁵ See Indroharto, as quoted in Ridwan HR, *Hukum Administrasi Negara*, (Yogyakarta : UII Press, 2003), p. 59 and SF. Marbun, *Peradilan Administrasi Negara dan Upaya Administratif di Indonesia*, (Yogyakarta : Liberty, 1997), p.60.

¹⁵⁶⁶ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 1.3

¹⁵⁶⁷ Determination of the status of an entity as a public body can be conducted by looking at several criteria as follows: The legal entity obtains authority through attribution, delegation, mandate or concession, which objectives are in serving the public interest. Such authority can be derived from laws and regulations, entrustment of task from the government or such authority can also be derived from cooperation between the government and the entity in performing state functions. Komisi Informasi Pusat Republik Indonesia, Anotasi Undang Undang Nomor 14 Tahun 2008 Tentang Keterbukaan Informasi Publik p.39

If such logic is followed, Palyja and Aetra are public service institutions, their officials are therefore public officials acting on a delegated authority, their decisions on investment, connection and disconnection issues are administrative decisions (subject to reviews at the administrative court) and any documents resulting from their activities are public information.

This interpretation, however, is rarely implemented in practice. Although concessions are common in Indonesia and have been implemented in almost every sector such as mining, oil and gas, forestry and infrastructure, concessionaires are always seen as a private entity. Concession contracts tend to be seen as purely private contracts and, in practice, any disputes resulting from them are often referred to a private court, not the administrative court.

The following **Table 10** summarises the applicability of the Freedom of Information Law to institutions involved in water utilities regulation:

Institutions	Role	FoI Applicable?
Department of Public Works, The National Planning Agency	General policy/ direction	Yes
Ministry of SOE Governor	Financial management	Yes
Ministry of Health	Drinking Water Regulator	Yes
Jakarta Governor/Jakarta Regional Government	Tariff determination Monitoring of performance Financial Management Operational licence	Yes

Jakarta Water Sector Regulatory Body (JWSRB)	Mediation and conciliation of consumer disputes, monitoring of performance, advisor to Jakarta Governor in tariff determination	Very likely. JWSRB denied that it is applicable.
Ministry of Environment/ Bappedal Badan Pengendalian Dampak Lingkungan Daerah DKI	Environmental licences Enforcement of environmental matters	Yes
PT Jasa Tirta	Bulk Water Supplier	Yes
Perusahaan Daerah Air Minum Jakarta (PAM Jaya)	Contract and performance monitoring	Yes
PT PAM Lyonnaise Jaya	Retail water supplier	No, although in theory it is possible
PT Aetra	Retail water supplier	No, although in theory it is possible
Perum Jasa Tirta	Bulk water supplier	Yes

6.6.2. Exemption clauses

Unlike English and Victorian FoI, all of the exemption clauses in Indonesian FoI Law are subject to both the harm test and the public interest test. This can be seen from the structure of the FoI Law, which ties both the harm test and the public interest test in relation to every exemption clause as a standalone *asas* (principal) clause which covers all of the provisions.¹⁵⁶⁸

6.6.2.1. Law enforcement

The Indonesian FoI Law recognises an exemption on law enforcement,¹⁵⁶⁹ but this covers only criminal law enforcement. Furthermore, the exemption is only applicable if a disclosure is deemed to obstruct criminal investigation¹⁵⁷⁰, reveal the identity of witnesses or informants or endanger the safety of law enforcers or their infrastructure. Investigations into civil or administrative matters are not covered in the exemptions.

As it can be considered a crime¹⁵⁷¹ to distribute drinking water which is unfit for consumption or jeopardise human health, cases on water contamination could be

¹⁵⁶⁸ The provision for harm and public interest tests is placed in Chapter II: Principle and Obligation, Article 2 (4) of the FoI Act. Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik This chapter is applicable to all provisions of the FoI Law. Compare this with FoI Act 2000 (England) s.2 which differentiates the effect of exemption by distinguishing it from absolute and 'relative'

¹⁵⁶⁹ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik, Article 17.a

¹⁵⁷⁰ "Investigation" under Indonesian Criminal Justice System consists of two stages: *penyelidikan*, a stage where no suspect has been declared by the police and the case has not been determined as a criminal offence and *penyidikan*, a later stage where a suspect has been declared, the case is declared by the police as a crime and the dossier is being completed for a transfer to the prosecutor's office

¹⁵⁷¹ Peraturan Pemerintah No. 16 Tahun 2005 (GR-16) prohibits the distribution of water unfit for human consumption (see article 6.2) however there are no criminal liabilities attached to this. If contamination occurs, then it will be dealt with by ordinary criminal law, the investigation of which might be covered by FoI exemption.

covered by this exemption, as long as they are being investigated by the police and the disclosure of information related to the case may obstruct criminal investigation. Violation of another service level, as long as they are not under police investigation, is not likely to be covered by this exemption.

6.6.2.2. Commercial Information

The Indonesian FoI Law¹⁵⁷² exempts all sorts of Intellectual Property Rights (IPR) and information which, if disclosed, undermines the protection against unfair business competition.¹⁵⁷³ The formulation of the FoI Law is unnecessarily wide as IPR covers a range of rights from patents, industrial designs and trade secrets to copyright. Some types of IPR such as patents and copyright already entail an element of publication and, as such, their exemptions are irrelevant. Some relevant IPR-related exemptions are for trade secrets, industrial design¹⁵⁷⁴ and plant varieties.¹⁵⁷⁵

In the aforementioned *BHP* case¹⁵⁷⁶ adjudicated by the Indonesian FoI commission, the respondent tried to argue that the Cooperation Agreement between BHP and ABSJ contained trade secrets and, therefore, should be exempted from disclosures. As the Respondent did not provide evidence for this, the FoI Commission

¹⁵⁷² Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article.17.b

¹⁵⁷³ Ibid

¹⁵⁷⁴ The obligation of confidentiality is only enforced on employees of the Directorate General of Intellectual Property Rights, the Ministry of Law and Human Rights, during the registration process pending announcement. See Undang Undang No. 31 Tahun 2000 Tentang Desain Industri Article 23

¹⁵⁷⁵ The obligation of confidentiality is only enforced on consultants, employees of the Office on Protection of Plant Variety and the relevant government officials, the Ministry of Farming, during the registration process pending announcement. See Undang Undang Nomor 29 Tahun 2000 Tentang Varietas Tanaman, Articles 13, 22, 23, 30.

¹⁵⁷⁶

rejected the Respondent's claim that the contract contained trade secrets. As the majority of data submitted to the regulator is rarely traditional technological trade secrets but merely business information, the trade secret argument is rare in disclosure cases involving utility regulation.¹⁵⁷⁷

The second category in the exemption clause: "*information which, if disclosed, undermines the protection against unfair business competition*"¹⁵⁷⁸ is more relevant to be disclosed in light of water utilities' regulation.

Under Indonesian FoI, there is only one public interest clause (the terminology used in the FoI Law is the *greater*¹⁵⁷⁹ interest) which applies generally throughout the whole law. The idea of "public interest", however, is not well developed in the legal system, although some legislation does contain a public interest clause.¹⁵⁸⁰ The system of codified law, where judges are considered only as interpreters of rules and shall refrain from making laws¹⁵⁸¹ probably constrains the development of the notion of "Public Interest".

The meaning of public interest is also influenced and constructed by the state's ideology towards the market. In Judicial Reviews of the water law, oil and gas

¹⁵⁷⁷ See O'Reilly, J.T., 'Confidential Submissions to Utility Regulators: Reconciling Secrets with Service' 18 Ohio Northern University Law Review 217

¹⁵⁷⁸ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik

¹⁵⁷⁹ Indonesian FoI Law, Art 2(4) and 19, The clause is not clear on what is meant by *consequence* and *greater interest* but its elucidation confirms that consequence refers to the interests which are protected under prevailing regulations and greater interest refers to public interest. Ibid

¹⁵⁸⁰ Indonesian Criminal Code Art. 14.h grant authority to public prosecutors to drop charges for *public interest* reasons

¹⁵⁸¹ Mertokusumo, S., *Mengenal Hukum, Suatu Pengantar* (5 edn, Liberty 2003)

law¹⁵⁸² and the electricity law¹⁵⁸³, it was revealed that market competition for vital services is not emphasised by the Indonesian Constitution. In its water law ruling, the Constitutional Court affirms that regional waterwork companies (PDAM) should not position themselves as profit-oriented companies.¹⁵⁸⁴

In terms of public utilities, therefore, the notion of a ‘public interest’ towards the functioning of the market is treated with great caution. This is not to suggest that competition is not protected. The Indonesian Competition Law states that “*Business actors shall be prohibited from conspiring with other parties to obtain information regarding the business activities of their competitors classified as company secrets which may result in unfair business competition.*”¹⁵⁸⁵ Meanwhile under the FoI Law, exemption from disclosure is granted only if it undermines protection from *unfair business competition*.¹⁵⁸⁶ The Elucidation of the Indonesian FoI clarifies that the clause aims to protect business practices which are dishonest, illegal or undermine

¹⁵⁸² *Judicial Review of Law Number 22 of 2001 Concerning Oil and Gas, Judgment of 15th December 2004, No. 002/PUU-I/200* Constitutional Court of the Republic of Indonesia

¹⁵⁸³ Al’Afghani, ‘Constitutional Court’s Review and the Future of Water Law in Indonesia’ The Constitutional Court revoked the Electricity Law for allowing the unbundling of electricity services. Such unbundling, according to the Court, relinquished price determination to the market mechanism and diminished the state power in intervening with prices. Such measure is in violation of Article 33 of the 1945 Constitution.

¹⁵⁸⁴ *Judicial Review of Law Number 7 Year 2004 regarding Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU/2004*: “PDAM has to position itself as the state’s operational unit to realize the state’s obligation as stipulated in Article 5 of the Water Resources Law, and not as the company which is economically profit-oriented” (Official Translation)

¹⁵⁸⁵ Undang Undang No.5 Tahun 1999 Tentang Praktek Monopoli dan Persaingan Usaha Tidak Sehat Article 23. Translation by the Indonesian Commission for the Supervision of Business Competition

¹⁵⁸⁶ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 6.3.b and 17.b

competition.¹⁵⁸⁷ In order to maintain an exemption, therefore, respondents will need to argue that the information request is illicit, or motivated by commercial gains.

The articles above will only apply *if* there is competition in the sector. Given that private operators are given a legal monopoly over certain regions by the regional government (and since direct competition is not foreseeable for the moment) claiming for public interest towards exemption may be difficult.¹⁵⁸⁸ The idea that a concession is a form of licence and that the operators themselves as concessionaires are public officials mandated with some form of governmental authorities would weaken the argument towards secrecy. *If* a concession – by definition – is a public service, then any information generated from it would be public information, the non disclosure of which can only be justified if the public is put at harm. One of the public service functions of a concession is ‘institutional learning’¹⁵⁸⁹. In addition to obtaining value for money for the delivered service, the regional waterwork companies or other water companies in another region need to learn from the concessionaire. Such a learning process requires a certain degree of openness.

Competition *for* the market in the form of tender for an exclusive legal monopoly to distribute water can enjoy such protection and this is confirmed by the procurement rule. But once the tender process is over and the winner is pronounced, there is no more justification to keep the information secret. In fact, there is a demand

¹⁵⁸⁷ Ibid elucidation of Article 6 (3) b

¹⁵⁸⁸ See *Decision 056/2006 MacRoberts and the City of Edinburgh Council* and section 4.5.1.2. above

¹⁵⁸⁹ See Colin, J. and Lockwood, H., ‘Making innovation work through partnerships in water and sanitation projects’ (2002) <<http://www.bpdwaterandsanitation.org/english/docs/innovationsumm.pdf>> accessed february 17, 2012

for accountability and transparency of the tender process in the form of an explanation by the tender committee as to the rationale of their decision.

It is possible that a water company already entrusted with a legal monopoly feels that disclosure of its tender information is harmful since it decreases its competitiveness to bid for another project in another region. In this case, the task of the FoI Commission and the Court is to define and construct the meaning of 'public interest'. On the one hand, there is the interest of the bidding company, to maintain its domination position by withholding information and, on the other hand, there is a public interest to open up the market to allow the delivery of public services at efficient cost.

6.6.2.3. Confidentiality obligation

Regulatory information can be submitted by the utilities to regulators on a confidential basis, which results in the obligation of the regulator not to disclose the information to a third party. In Indonesian FoI, there is no specific exemption on the confidentiality obligation as the law does not recognise a "duty of confidence". In England, the duty to hold information confidential arises out of equity or contract.¹⁵⁹⁰ Nevertheless, under Indonesian Law, the obligation of confidence may arise out of contractual obligation¹⁵⁹¹ or be mandated by the regulatory statute. In Jakarta,

¹⁵⁹⁰ Coleman, A., *The legal protection of trade secrets* (Sweet & Maxwell 1992)), 12

¹⁵⁹¹ All contracts are legally binding as law on the parties. Indonesian Civil Code, the "Burgerlijk Wetboek" Article 1338.

JWSRB is obligated under its mandate to maintain secrecy of *all*¹⁵⁹² information and must use information in the regulatory process only for the purpose of mediating potential disputes arising out of the concession. Similarly, PAM Jaya is bound by contractual confidentiality obligations¹⁵⁹³ (See section 6.4.7. above “General Disclosure Policy) and has refused an FoI request to disclose the contract document and other regulatory information.¹⁵⁹⁴

As demonstrated in *BHP*, Respondents often use obligation of contractual confidentiality to argue for exemptions. In this case they were trying to argue that disclosure of information will trigger liability by way of ‘breach of contract’ under the Indonesian Civil Code. Directors of a company, therefore, according to the Respondent, must be careful not to disclose information that would cause litigation and bring losses to the company.¹⁵⁹⁵

The “MALE” (Maximum Access, Limited Exemption) principle under Indonesian Law requires that exemption can only be given under very limited and narrow exemption clauses provided in Article 17. The FoI Law at Article 17.j. does provide exemptions for *Information which shall not be disclosed pursuant to*

¹⁵⁹² Peraturan Gubernur DKI Jakarta No.118 Tahun 2011 Tentang Badan Regulator Pelayanan Air Minum , Art 6.b.

¹⁵⁹³ See Cooperation Agreement Between PAM Jaya and The Concessionaire, 2001 Clause 47

¹⁵⁹⁴ Daryanto, Jawaban Surat KRuHA (Letter No. 581/DIV.T&P/XI/2011 dated November 8 2011 on PAM JAYA's response to FoI Request by KRuHA) Reza, Permintaan Dokumen dan Informasi Kontrak Konsesi Layanan Air Minum Jakarta (Freedom of Information Law Request for Documents and Contractual Information Concerning Jakarta's Water Services Concession), Letter No.019/KIP/V/2011 dated October 31, 2011 Rizal, Tanda Terima Pendaftaran Pengajuan Sengketa Informasi No. A26/RSI/P/XII/KIP/2011, KRuHA vs PDAM DKI Jakarta, 07-12-2011

¹⁵⁹⁵ The Corporation Law 40 Year 2007 at Article 97(3) hold directors liable for the losses sustained by the company. Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas

legislations. The FoI Commission and the Court may require that the referred legislation explicitly states which information is intended to be withheld. Since Indonesian Corporations Law does not mention any specific information that should be withheld from the public, Article 17.J. of the FoI Law cannot be used. A mere construction or interpretation that the company law infers non disclosure is not sufficient.

The possibilities that litigation for breach of contract arises due to disclosure by government officials as a result of FoI requests, however, poses another problem. The FoI disclosure case and the breach of contract will be dealt with as a separate case involving different judges. The FoI case will be adjudicated by the FOI commission and in case of appeal either to an Administrative Court (if the respondent is a state entity) or a State Court (if the respondent is not a state entity),¹⁵⁹⁶ while the breach of contract litigation or shareholders' litigation will be dealt with by the private law chamber of the State Court. It is possible to submit evidence from the previous FoI tribunals to the private law proceeding, but since the Indonesian Judiciary recognises no *stare decisis*, there is nothing to prevent the judges in deciding otherwise and, in turn, inflicting damages on the company.

Bearing this in mind, it is thus better to regulate FoI disclosure as part of mandatory provision in the procurement contract, as shown by the Victoria case study, as this will deter 'breach of contract' litigation.

6.6.2.4. Confidential Memorandum

¹⁵⁹⁶ Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article 47

Indonesian FoI has no specific exemption for policy formulation. Such exemption is possible if formulated in the form of a ‘confidential memorandum’ (Article 18 i).¹⁵⁹⁷ The elucidation elaborates that such exemption is meant to protect “frankness and candour” in the decision making processes, the premature revelation of a future policy and success of an ongoing negotiation.¹⁵⁹⁸ However, since the exemption is formulated in the form of a confidential memorandum, it cannot be applied to other forms of documents such as meeting notes.

6.7. Chapter Conclusion

Water services governance in Jakarta is interesting and complex. The Jakarta concession was granted in 1997 when Indonesia was led by an authoritarian regime without any procurement. Jakarta’s water services by-laws, enacted in 1992 and 1993, were not tailored for the concession and have never been amended to adjust to the concession scheme. Both by-laws are still in force today.

Water law reforms were conducted in 2004 through the enactment of Water Resources Law 7/2004 and GR-16 on water services. Law 7/2004 contains only one provision on private sector participation in the water sector, at Article 40, the provision of which caused controversies which were among the subjects submitted to a judicial review at the Constitutional Court. Water Law 7/2004 was declared “conditionally” constitutional by the Court but a dissenting judge branded Article 40 a “disguised” privatisation. The Article – presumably because it is intended to be “disguised” – does not provide clarity on the legality and scope of private sector

¹⁵⁹⁷ Ibid Article 18 i

¹⁵⁹⁸ Ibid Elucidation of Article 18 i

participation in water services. GR-16, the secondary law which was supposed to clarify Water Law 7/2004 in terms of the scope and mechanism of PSP is also unhelpful and even added to the confusion. Nevertheless, these two national laws provide more transparency in terms of a tariff setting mechanism and also more protection to consumers. However, as discussed above, they are deemed inapplicable by both the regulator and the private sector. Jakarta's regulatory structure is suffering from overlap between regulatory institutions. The JWSRB, which is supposed to be an independent regulatory body, does not have any of the powers normally enjoyed by its counterparts in England or Victoria. Under the contract, JWSRB has neither the power to enact prices nor the power to impose penalties on regulated entities. In fact, its only function is in mediating disputes (before they are referred to an alternative dispute resolution mechanism) and in providing recommendations on tariff increases to the Governor. PAM Jaya on the other hand – which is a regulated entity – has more power to ask for regulatory information from the concessionaire compared to JWSRB and also has the contractual power of supervising the concession as well as imposing penalties. Recent amendments to the JWSRB statute complicate the problem by requiring JWSRB to be accountable to PAM Jaya in terms of its budgetary planning. As PAM Jaya owes huge debts to the concessionaire, it will have less incentive to become transparent if the information concerns financial issue. This is proven by a newspaper polemic on the existence of a consumer compensation scheme between a JWSRB member and PAM Jaya Director.

To add to the complexity of the Jakarta system is the unclear nature of the Cooperation Agreement: is it a purely private contract or a *concessie* which has the characteristics of a licence? The thesis has elaborated the opinion of Indonesian administrative law scholars from the past that perceive *concessie* as a form of licence combined with the delegation of governmental authorities. This, however, is not the contemporary view of scholars and, in addition to that, the law of the administrative

court has completely overruled government contracts as an administrative ‘decision’ reviewable by the Court. If the Cooperation Agreement is perceived as a purely private contract then the arguments for transparency will be less appealing.

One of the primary disadvantages of the Cooperation Agreement is the existence of a confidentiality clause. The clause covers all regulatory information –in practice the clause is deemed to also cover the contract itself – and prevent the public disclosure of any regulatory information. Among the information covered is consumer rights to compensation (which were the subject of polemic), service level and investment mechanism. In both England, Victoria and even Bogor, a city 60 km south of Jakarta whose utilities are publicly-owned, this information is by default public. PAM Jaya is a public body and has the obligation to disclose information under Indonesian FoI Law. However, if PAM Jaya complies with the law, it can be held liable for a breach of contract. The regulatory body, JWSRB, as a non party to the contract, is not bound by the confidentiality provision. Nevertheless, JWSRB is created through the contract and embodies the confidentiality principles in its statutes – the statute is stipulated in a Governor’s regulation. It is not clear if the FoI Law is applicable to JWSRB due to its hybrid character. Application of the analytical framework to a Jakarta case study is tabled in **Annex 1**.

Through this chapter, the claim that PSP decreases transparency, at a glance, appears to be correct. However, the experience with England tells another story. Thus, it would take a side-by-side comparison of the analytical framework to understand and explain why England appears to be transparent and why Victoria, despite confidentiality provision in its contract, could still render its FoI applicable. These issues will be discussed in the next chapter.

7. LESSONS LEARNED

This thesis starts with the Research Question: “How can Legal Frameworks enable Transparency in Water Utilities’ Regulation?” Three concepts which are central to the research question i.e. “Legal Frameworks”, “Transparency” and “Water Utilities Regulation” have been clarified in the preceding chapters. These concepts help to form the analytical framework which is developed in Chapter II and is then applied to the whole thesis.

“Legal Frameworks” comprise of several categories. The first is sectoral versus general administrative rules applicable to water utilities’ regulation. Sectoral rules include the law on water services and private contracts between utilities and the government, whereas general rules include corporation law, procurement rules and access to information laws. The second category is the differentiation between ‘active’ versus ‘passive’ disclosure provisions found in the aforementioned sectoral and general rules. ‘Active’ disclosure provisions are the type of provisions obligating a person to disclose certain specific information to the public, whereas ‘passive’ disclosure provisions are the type of provisions which grant the public a general right of access to information to certain prescribed bodies, without specifying the details of the information that needs to be disclosed. These rules and the active and passive disclosure provisions contained within them form the analytical framework.

“Transparency” is defined as “disclosure of information” to the public. Disclosure of information to regulatory bodies is not yet a complete “Transparency” in the context of the research question if the information is not disclosed further to the public. Such internal disclosure only makes information “available” to regulatory bodies. As the ‘active’ type provision above requires the disclosure of specific information, the Analytical Framework also determines the types of information in water utilities’ regulation that need to be disclosed *actively* to the public. These

comprise three general categories: policy in involving the private sector, regulatory decision making, and utilities' corporate governance, each of which specifies the information which is required to be disclosed. Meanwhile, the *passive* disclosure rule is evaluated in terms of its applicability to institutions involved in the water sector and the features of its exemption clauses. The overall application of the Analytical Framework to the case studies is recapitulated in **Annex 1**.

As seen in **Annex 1**, each of the three jurisdictions compared has its own ways of enabling transparency in their efforts to regulate water utilities. Some of their methods can be transferable to other jurisdictions, while some are particular to the characteristics of their regulatory processes. The lessons learned from three jurisdictions are as follows.

7.1. Policy in Involving the Private Sector

Whether or not water services provision can be delegated to the private sector, the extent of such delegation, the body which has the power to delegate and how the delegation is carried out are sensitive issues in water utilities' regulation. Such concern is embodied in General Comment 15 on the Human Right to Water which recommends "full and equal access of information" concerning water held by states or third parties and reports from the Independent Expert (now Special Rapporteur) of the Human Right to Water which emphasizes that any decision towards delegation should be democratic, participatory and transparent.¹⁵⁹⁹ Similarly, a human rights framework requires transparency in tendering, bidding and

¹⁵⁹⁹ See section 3.1, Ownership and Delegation to Private Sector above

the contract negotiation processes. The Independent Expert specifically outlined that *“Commercial confidentiality must not jeopardize the transparency requirements provided for under the human rights framework”*.¹⁶⁰⁰

For England, the question of delegation is resolved by Parliament. Through the 1989 Water Act, Parliament decided to fully privatise water utilities through assets divestiture. Since the UK Parliament is the highest political forum in the country, the enactment of the 1989 Water Act – which contained divestiture clauses– is deemed to be sufficiently democratic. The follow-up questions of procurement and contract negotiation are to this extent less relevant to England which divested its assets through flotation, although such questions might be more relevant in the future due to further restructuring of the English water industry. Only in Victoria and Jakarta (as with many states around the world) where contracting is employed as an instrument of delegation, the questions of procurement and contract negotiation are relevant. In these jurisdictions, the question of democracy arises because there is a distance between the Parliament, which is accountable to the public through elections and other means, and the decision to delegate water services. Both in Victoria and Jakarta, the decision to delegate water services lies within the discretion of the executives.

¹⁶⁰⁰ See section 3.1, (Analytical Framework) Ownership and Delegation to Private Sector above

7.1.1. The decision to delegate

Both in Victoria and Jakarta, there is a legislative ‘entrenchment’ of public ownership. The Victorian Constitution mandates that a “public authority”¹⁶⁰¹ which is accountable to the Minister be responsible for ensuring the delivery of water services. Meanwhile the Indonesian Water Resources Law prescribes that “*State Owned Enterprises and Regional Owned Enterprise are the undertakers of drinking water provision system*” although it adds that “*Cooperatives, privately-owned business enterprises and the society may participate in the undertaking of the development of drinking water provision system*”.¹⁶⁰²

Full divestiture of assets will not be compatible with the legal provisions in Victoria, since if the assets are divested, it will no longer fall under the definition of a “Public Authority”. Full divestiture is also incompatible with Indonesian legislations as the law restricts water services delivery to State- or Regional-Owned Enterprises. However, Private Sector Participation (PSP) is possible since it is never directly prohibited by legislation in either jurisdiction. In both case studies the legal frameworks are unclear with respect to the allowable extent of PSPs. The most common PSP is implemented only in specific parts of the water cycle, such as a treatment plant in Victoria. However, some PSPs, such as the Jakarta’s Cooperation Agreement, range from treatment to distribution, completely removing the incumbent utility (PAM Jaya) from its operational duties and positioning it as a quasi-regulator and contract supervisor. As demonstrated in the preceding chapters,

¹⁶⁰¹ See Victoria Chapter Section 4.2.1 (Determination of Ownership and Regulatory Model)

¹⁶⁰² See Jakarta Chapter, section 6.2.2 (Ownership and Regulatory Model)

such PSPs have far reaching consequences towards public accountability. The regulatory reform in Indonesia is also ambiguous with respect to whether PSPs are allowed for non greenfield projects. The national law, GR-16, stipulates that cooperatives and/or privately-owned business enterprises may participate in the development of drinking water provision systems in regions which are “not yet covered” by services provided by SOE or regional SOEs. This provision is not clear on what is meant by “not yet covered”. There are several feasible scenarios: (1) regions with the presence of a regional water utility, but have not reached 100% coverage – which is a common case in Indonesia, (2) regions with 100% coverage but with under average service levels or (3) regions with 100% coverage but are considering the expansion of their catchment or treatment facilities for future contingencies. It is not clear if PSPs would be allowed in those circumstances.

Thus, despite the ‘entrenchment’ of public ownership in Victorian and Indonesian legislation, there is always scope for PSPs and this scope is vague. In order to provide clarity and transparency, legislation must be comprehensible, it must clarify the type of PSP allowed and differentiate the delegation procedure according to the scope of the water services cycle that it wishes to delegate.¹⁶⁰³ If most parts of the water services cycle (from treatment to distribution) are able to be delegated, it will have far reaching accountability consequences and as such may require specific procedures prescribed by the legislation which could be in the form of a referendum or a parliamentary approval. At present, both in Victoria and Jakarta, all decisions to delegate, irrespective of the scope of the water services cycle, are in the hands of the executive.

¹⁶⁰³ See the definition of transparency in Section 2.6

7.1.2. Procurement

In Indonesia, all types of procurements must be announced through the procuring institution's website, official announcement board and the national procurement portal tender. The purpose is to allow interested parties to bid. Prior to this, the regional parliament (or the Ministry of Finance officials in each region) must approve the institution's budget plan. The result of the selection of the preferred bidder is announced through the agency's website and official announcement board. Finally, according to the national model on procurement, information on the bidding process up to the determination of the winner as summarised on the Bid Evaluation Report shall not be disclosed to the bidders or any other party until the contract is signed. There are no other transparency, accountability or public participation mechanisms.¹⁶⁰⁴

Similar to Jakarta (Indonesia), in Victoria the "Expression of Interest" should be published through the procurement website. In Victoria, however, there is more emphasis on public accountability and transparency of procurement. The National Guideline also mentions the need to 'consider' access, accountability and consumer's rights. Accountability – including the applicability of the FoI Act to procurement is considered as "risk", to be borne by the government but there is no adequate guidance on how it should be assessed and mitigated. Full disclosure is a general principle, but in order to protect competitiveness and sensitive information it only applies to the PPP

¹⁶⁰⁴ See Section 6.3

Contract and not during the bidding process. The Government should guarantee that information on project performance is available for release after contract execution.

An important lesson from Victoria is the effort to integrate the Freedom of Information Act with procurement. It requires private parties to agree that disclosure by way of FoI will not amount to a breach of confidentiality.¹⁶⁰⁵ In practice, this is formulated in a waiver clause which serves as an exception to the contract's general confidentiality provisions. Such a waiver clause may be efficient in protecting liabilities arising out of contractual confidentiality, but will not be applicable to confidentiality obligations arising from outside the contract such as equity law.

In both Victoria and Indonesia, there is a sense that transparency in procurement is still focused mainly on particular stakeholders, in this case the bidders and other market players interested in bidding, rather than the public. Thus, transparency is perceived only as a tool to facilitate fair competition and generate value for money in procurement. This kind of transparency lays emphasis on the disclosure of information required for those interested in bidding, such as the call for tender, the specification of the goods or services to be procured and the prerequisites for participating in tenders. On the other hand, the notion of "Public Interest" is certainly greater than the mere agenda to facilitate competition or in achieving value-for-money for the project¹⁶⁰⁶ and this may require disclosure of other kinds of information, such as the rationale and consideration of the procurement team on why it arrives at certain decisions. In this respect, Victoria fares better than Indonesia as

¹⁶⁰⁵ See sections 4.2.2 and 4.2.3

¹⁶⁰⁶ This is discussed in sections 1.4.3 and 2.1

there is already an attempt to integrate FoI with procurement rules and there is an acknowledgement that the accountability problem is a kind of risk, although it still lacks an outlining of how it should be assessed and weighted. Victoria enables transparency in procurement not through legislation, but through guidelines, which influence the procurement process including the contract drafting.

7.1.3. Publication of Contract

In Indonesia, both the Law on Public Service and the Law on Freedom of Information require contracts entered into by the government with the private sector to be published. Similar requirements are imposed on Victorian Public Bodies as a matter of policy. However, although only a matter of policy, the requirement to disclose a contract in Victoria is enumerated in greater detail than in Indonesia. For example, the Victorian contract publication policy is clear in that it intends to publish in full and in readily accessible format, contracts over 10 million USD of value and requires only the publication of headlines of contracts worth more than 100,000 USD. In Indonesia there is no clarity on the policy of contract publication. The Indonesian FoI Law requires contracts to be published, but does not set the value threshold.¹⁶⁰⁷ It would be burdensome to the bureaucracy if the FoI Law requirement is interpreted to mean that all contracts, including those having miniscule financial value, be published in full. The Indonesian Public Service Law on the other hand also does not provide clarity as it requires only the publication of key contractual terms.

¹⁶⁰⁷ See section 6.3.3

A good practice in Victoria – something that Indonesia could learn from – is the high level of integration of disclosure policies with general administrative law as well as sectoral law and policies, especially the procurement policy. The Indonesian procurement rule does not contain any clause mandating contract disclosure although legislations, the aforesaid FoI Law and the Public Service Law, do. This creates a disharmony between parliamentary legislations and the practice of procurement. In Victoria, the procurement guidelines specifically refer to the principles of the FoI Act. Premier Bracks' contract publication requirements are also referred to in the Procurement Guideline.¹⁶⁰⁸

In addition, the contract disclosure policy in Victoria is also embodied and interlinked with public sector accounting. The Victorian Department of Treasury and Finance regularly issue Financial Reporting Directions to the public sector. The contract disclosure policy is embodied in FRD 12 A which also sets the guidelines for exclusion from publication by referring to FoI Act exemptions.¹⁶⁰⁹

Finally, there is a role for formal institutions: the Victorian Government Procurement Board (VGPB) and the Victorian Auditor-General. The VGPB as Victoria's centralised procurement board administers and announces every call for tender in the Victorian public sector. At the same time, the VGPB also publishes contracts which result from the procurement. The Victorian Auditor General has wide powers under the Audit Act 1994 and also has the mandate to oversee the implementation of contracts disclosure policies. With such powers, the Auditor

¹⁶⁰⁸ See sections 4.2.2 and 4.2.3

¹⁶⁰⁹ See section 4.2.3

General is able to have access to documents in the possession of agencies, conduct audits and report them to the parliament and the public.

Nevertheless, the Victorian ways of managing government contract publication through a set of fragmented policies (the Policy Statement and Guideline, the Procurement Guidelines and FRD12A) have some compliance problems. The initial policy statement requires that any excisions from disclosure should be given explanations. This was not implemented in some instances as it is deemed to be required only by the policy statement and not by FRD 12A. If the contract publication requirement is embodied in statute as well as properly reflected in policies, its enforcement would have been more coherent.

7.2. Regulatory Decision Making

7.2.1. Licences

Crucial to the transparency of licences are specifications on the types of licences, the criteria for application, the licences' conditions and whether there is an obligation or policy to publish licences in the public domain. Water utilities might be subjected to various kinds of licences, but when this thesis uses the term "licence" it means 'operational' licences which contain some authorisation by the state for the water utilities to carry out the delivery of water services in its service area. The procedure for obtaining such operational authorisation including the publication of such authorisation in the form of licences is important due to the natural local monopoly nature of the water industry.

Each of the three jurisdictions has a different understanding of what a 'licence' is and, therefore, the role of licences varies from one jurisdiction to another. England – for the time being – is very much a licence-based regime, so the majority of

regulatory arrangements in the English water industry are stipulated in the utilities' licences. Victoria makes less use of licences as it dissects their regulatory arrangements into several other instruments, the Statement of Obligation and Water Industry Regulatory Order. Jakarta has a parallel and somewhat conflicting regulation: The "Cooperation Agreement" system which dates from 1997 and the new water law regime which has applied throughout Indonesia, including Jakarta, since 2004. Both the Jakarta contract system and the new Indonesian water law applicable to Jakarta are problematic in terms of its licensing.

The type of licences applicable in the water services sector is clarified by legislation in England and in Victoria but not in Indonesia. The criteria for approving licences are also well defined in England and in Victoria but not so in Indonesia. This is because there are ambiguous provisions in Indonesian Water Law and its implementing regulations with respect to the extent to which private sector participation would be permissible.¹⁶¹⁰ Indonesia attempts to limit private sector involvement by allowing them to participate only in a **region which is not yet covered by services provided by SOE or regional SOEs**. This creates confusion as to whether the rule only intends to allow greenfield projects in water services or whether non greenfield projects can be allowed in some cases. In practice, a large amount of brownfield projects have been approved or are in the process of tender. The ambiguity leads to lack of clarity on the type of licences, the conditions attached to them, and ways to obtain them. This obviously opens up opportunities for corrupt dealings.

¹⁶¹⁰ See section 6.2.2

OFWAT's (England) licensing practices for appointment and variation of existing undertakers' licences as well as for WSL licences are ideal ones. The criteria for approval and the licence's conditions in England are well defined in the legislation. Thus, the private sector knows what is expected of them by the regulators. The English licensing practice has several important transparency mechanisms that could be implemented in other regions. The only problem is that there is no uniformity of transparency policies in licensing, some types of licences have more of a transparency threshold than others. The transparency mechanism in the English licensing regime is as follows. First, there is a statutory obligation for the regulator to issue guidelines on how to apply a licence (applicable to WSL licences).¹⁶¹¹ Second, for NAV licences there are obligations for applicants to 'serve notice' to authorities and existing appointees – although not the public and for companies intending to apply WSL licences there are public disclosure obligations through a website. Third, for NAV licences, there is also an obligation for OFWAT to publish and declare its intention of making an appointment and variations which must be published in a manner appropriate to bring attention to any affected persons and also in providing opportunities for any interested stakeholders to express their objections. For WSLs, there is also a scope for stakeholder participation. Legislation does not specify reason giving for NAV licences, but OFWAT has a policy to disclose the rationale behind the rejection of applications. Conversely, for WSL, there is a specific reason giving obligation imposed on OFWAT in the legislation, through a notice to unsuccessful applicants, although there is no requirement to publicly disclose it.

¹⁶¹¹ See section 5.3.1 above

Similar ex-ante publication requirements are also imposed on applicants in Victoria, where legislation provides that no persons can apply for a licence unless the Minister has published the call for the application in the Government Gazette and local newspaper. This kind of requirement is beneficial for minimising corruption. This mechanism is also important to make the public (and any competitors) aware that the government is planning to entrust the delivery of water services in their region to a local monopolist. In Victoria, applications for licences are required to be published in local newspapers, specifying the applicant's name and the area intended to be covered by the licence and interested persons are invited to make submission.

What is lacking in all jurisdictions are ex-post legal requirements to publish licences, although in Victoria there are gazettal requirements to publish licences and the SOO must be available on each utility's website and its copies must be prepared for inspection. For England, the lack of legal obligation to publish licences is mitigated by an OFWAT policy (which is enabled by the WIA s.201) on publishing licences.

In Indonesia, neither the national regulation (under Water Law 7/2004 and GR 16/2005) nor the regional by-laws and the Cooperation Agreement provide clarity on the publication of licences. Another complicating problem in Jakarta, is the categorisation of the Cooperation Agreement with the private sector. If the contract is regarded as a '*concessie*' (concession but in the "legal" sense of the term) then it may be treated as if it is a licence and some of the decisions made by the concessionaire holders could be subjected to public scrutiny through judicial review by the Administrative Court. This does not apply if the contract is categorised as a

common private contract “made by the government in the course of its daily activities”.¹⁶¹² If the contracts are kinds of licences, then the public would have more claims in asking for disclosure, because licences should be subject to public scrutiny and evaluation by the state. On the other hand, if it is regarded as a purely private contract, then there is more justification for non-disclosure.

In later sections we will see that licence-based regimes are generally more transparent than contractual regimes. This is because in licence-based regimes, the regulatory arrangements are stipulated in licences, which are public documents. In contractual regimes, the regulatory arrangements such as service levels, customer service and investment planning are stipulated in contracts which – unlike licences – could be subjected to confidentiality clauses. Licence based regimes such as in England also require that legislation properly specifies in detail the ways to obtain licencess and the conditions attached to them.

7.2.2. The regulator’s internal governance

In all three jurisdictions, legal frameworks regulate the composition, structure, term of office, appointment and removal mechanisms for members of the regulatory bodies. The power to appoint and remove members of the regulatory bodies is vested in the executive. In England, the power to appoint and remove rests with the Secretary of State, whereas in Jakarta, it rests with the Governor. In Victoria, the power to appoint rests with the Governor in Council but removal must

¹⁶¹² See section 6.4.2

be approved by parliamentary resolution (see below). Presumably, this is meant to reinforce the regulatory body's insulation from the executive's political interference.

With the exception of Victoria, transparency mechanisms are used when filling positions as members and chairpersons of the regulatory body. In Jakarta, selection for JWSRB members must be announced to the public. There is, however, no explanation of whether this obligation falls to the Governor and no clarification on how the publication needs to be carried out. The Victorian legal framework lacks a transparency mechanism in the appointment of ESC members. The ESC Act contains provisions on appointment, as discussed in the previous paragraph, but is silent on its mechanism. The best practice of the three jurisdictions compared is England. OFWAT's board appointments by the Secretary are subject to transparency requirements imposed by The Commissioner for Public Appointments. The selection is carried out by setting up a recruitment website and candidates may be required to appear before a parliamentary select committee.¹⁶¹³

Other than appointments, removal of members from the membership of a regulatory body is also an important issue. This is mainly because the creation of 'independent' regulators needs to calculate any possible conflict between the executive and the regulatory body and the abuse of the executive's statutory powers in removing them from their membership. Victoria addresses this by requiring parliamentary approval and Jakarta addresses this by requiring suspensions (which precede removal) to be announced transparently to the public. However, in Jakarta,

¹⁶¹³See section 5.3.2 and 5.3.3

there is no parliamentary intervention in the removal process, so the position of the regulators in the face of the Governor is significantly weaker than in Victoria. England, while faring best among the three on its transparency in appointing OFWAT board members, does not regulate in detail the procedure of removal of OFWAT members by the Secretary.

Conflict of Interest (CoI) management is another important topic in the regulator's internal governance and transparency mechanisms play an important role. England has good practice in defining clearly what is meant by "prohibited interest" and requiring its disclosure. What is lacking in England is that OFWAT's rule of procedure does not really clarify to whom the CoI should be disclosed: the public or OFWAT's Chairman and Secretary. Nevertheless, some memberships, positions and relationships which may trigger CoI must be disclosed in the The Register of Board Members' Disclosable Interests,¹⁶¹⁴ which – according to Ofwat's procedure – is a public document. The register is a powerful transparency instrument of Ofwat's internal governance as it allows the public to immediately scrutinise any possible CoI. Jakarta on the other hand is lacking in terms of CoI management. CoI is nowhere mentioned, defined or regulated in the legal frameworks applicable to JWSRB. There are only minimal regulations on appointment and dismissal of regulators.¹⁶¹⁵ In Victoria, CoI is regulated in primary legislation, but it lacks definition and transparency requirement. There are only two provisions relevant in the context of CoI: the obligation for the ESC Chairperson not to take paid

¹⁶¹⁴ See section 5.3.3.

¹⁶¹⁵ See section 6.4.4

employment and the obligation of all members to disclose existing or foreseeable pecuniary interest to the Minister.¹⁶¹⁶ However, there is no requirement to publicly disclose these interests.

7.2.3. Means of Acquiring Information

The regulators' means for acquiring information from utilities carry important transparency implications since, if regulators lack power in obtaining information from the utilities, it will not have much to disclose to the public. However, there is no guarantee that regulators will publicly disclose all information it acquires from the utilities. Their propensity to disclose will depend on their disclosure policy – to be discussed on the next section.

The legal framework used for acquiring information differs across the three jurisdictions compared and is dependent upon the regulatory model. In Jakarta, the primary instrument is the Cooperation Agreement. In Victoria, it is the legislation, the WIRO and each company's SOO. In England, it is legislation and licences.

The content of the power to acquire information is quite typical, although the empowering instrument varies as discussed above. The most common is “reporting duties”. This method must be supplemented by specification of information and data to be submitted, usually stipulated through the “regulatory” accounting guidelines but can also be through other means.

In Victoria, the regulatory account is empowered by the ESC Act.¹⁶¹⁷ The commission may also request another set of information not specified in the ESC

¹⁶¹⁶ See section 4.3.3

¹⁶¹⁷ See section 4.4.2

Act, by a written notice which contains direction as to the details of information that needs to be submitted to them.¹⁶¹⁸ In England, the power to acquire information is outlined in the WIA 1991¹⁶¹⁹ and each company's licences.¹⁶²⁰ The annual data requirement is known as the "June Return",¹⁶²¹ the misreporting of which entails penalty.¹⁶²² OFWAT also obligates the companies to follow the Regulatory Accounting Guideline, which is not prescribed by statutes, but is referred to in the company's licence conditions. The position of the regulatory account in England is thus different from Victoria. In Victoria, the regulatory accounts are directly stipulated in the ESC Act whereas in England, they become binding because they are referred to in each company's licence. In Jakarta, the private sector is obligated under the contract to submit reports to PAM Jaya monthly, quarterly, semi-annually, annually and every five years. On the other hand, the private sector is under no duty to submit any report to JWSRB. There is also an obligation to 'maintain transparent accounts' but this is not followed by any reference to regulatory accounts.¹⁶²³ Hence, in Jakarta, there is no obligation to submit reports based on a prescribed regulatory account, although this could have been done by inserting a clause in the contract.

The second most common feature is the "investigative power". In this feature, the regulator does not rely on data submitted by utilities, but may appropriate data and information that it finds in the utility's premises. Hence, the

¹⁶²⁰ See section 5.4.2

¹⁶²⁰ See section 5.4.2

¹⁶²⁰ See section 5.4.2

¹⁶²³ See section 6.5.2

¹⁶²³ See section 6.5.2

¹⁶²³ See section 6.5.2

role of the legal framework is in enabling the regulator to enter, investigate or even confiscate materials from utilities' premises. In England, this is enabled, for example, through licence condition J though applicable only on several matters.¹⁶²⁴ The power includes the authority to inspect, make photocopies and take extracts from any books and records, carry out inspections, measurements and tests on any premises or plants, and take equipment onto such premises and plants.

In Jakarta, this is enabled by the contract, but limited to copying and verifying of the assets register and any documents directly related to it. Concerning utilities' accounts, PAM Jaya and JWSRB have the power to conduct audits and the concessionaire has the corresponding obligation to "*provide all requested information and data*", but there is no mention of the power to enter premises. The contract enables external audit by state audit agencies, and requires that they are given "*access at all reasonable times to the relevant books and records*".

Victoria's Department of Sustainability and Environment Inspectors are granted broad powers via the WIA 1994., This includes the authority to conduct searches in premises, to inspect, take photographs or samples, seize or open any closed containers but they are limited to (a) matters on planning, construction, operation or maintenance of works; (b) technical performance standards; and (c) water quality standards. Similar powers are enjoyed by English DWI. The Jakarta regulator lacks these powers. The ESC also has audit power under WIRO, but the WIRO makes no mention that it enjoys the power to enter premises.

¹⁶²⁴ See section 5.3.4

The third type is the power to acquire information from unregulated third parties. Jakarta regulates this in the contract by guaranteeing that PAM Jaya (but not JWSRB) shall obtain any data and information it requires from the concessionaire “...or, through the Second Party, from any of its agents, contractors, and representatives associated with the performance of this Agreement”. England, on the other hand, lacks this approach, despite the fact that for governing ring fencing, OFWAT has required utilities to procure undertakings from their parent companies, which include the provision of necessary information. In Victoria, the DSE inspector’s power, as mentioned above, is exercisable against a *person*, not just the regulated company. The ESC also enjoys wide powers. It has the power to acquire information from (1) *any person* – albeit with some possible limitations – and (2) the regulated companies.¹⁶²⁵ In addition, the ESC may require the companies to enter into an arrangement with third parties to submit information to the ESC.

It is important to note that although Victoria has the strongest legal means in acquiring regulatory information, England has the most detailed regulation on information acquisition; this can be seen from the sections below. Strong legal empowerment means that the regulator enjoys broad power (i.e. it can request information from *any person*, not just the regulated company, it can inspect premises or there is a harsh punishment for violating reporting duties) but unless this power is accompanied by adequate expertise and resources, it is no more than a paper tiger. Knowing which information is relevant to be asked for from utilities requires special expertise.

¹⁶²⁵ See section 4.3.4

7.2.4. Regulator's General Disclosure Policy

As mentioned, a regulator who has powerful means to acquire information will have the most opportunity to disclose regulatory information to the public. This, however, depends on whether legislation and their policies allow them to disclose such information.

In England, a disclosure policy is mostly the result of OFWAT's own initiative, as legislation is generally silent on the publication of information. Legislation acts as an "enabler" of transparency by providing regulators with wide discretion to publish information that they believe to be in the public interest.¹⁶²⁶ This discretion is further reinforced in the company's licence which enables OFWAT to publish any regulatory material for the purpose of carrying out of its functions. This discretion has some restrictions. Regulators should have regard to private affairs and caution if publication will "seriously and prejudicially affect" the private parties' interests. Another good practice from England is the policy to publish major regulatory information submitted by the utilities in their "June Return" data. A small category of information is allowed to be excised. These excision categories developed out of practice and are only to be used as a guideline. If companies invoke some of the excision category, it must be able to justify its excision and such justifications will be published along with the rest of the data. OFWAT has the final say as to whether or not to accept the utilities' rationale in invoking excision. In addition, the FoI channel is still available even if OFWAT granted the company's request for excision. However, the collection and publication

¹⁶²⁶ See section 5.3.5

of the June Return will no longer be relevant when OFWAT formalises its risk-based approach to regulation. As utilities will be required to publish regulatory accounts and key performance indicators, the locus for transparency in England water regulation will slowly shift from regulators to utilities. This may require amendment to the legal framework, presumably the utilities' licence condition, so that they are obligated to publish this information. The implication of the shift to risk regulation towards transparency will remain to be seen.

As opposed to England, regulators in Victoria and Jakarta lack empowerment to publicly disclose regulatory information. Jakarta's regulator has no obligation to disclose. On the other hand, it has the obligation to keep regulatory information secret. In Victoria, the closest thing to a requirement of public disclosure is the WIRO's general mandate for the ESC to "*publicly report the performance of a regulated industry*".¹⁶²⁷ This is more of a specific publication requirement of information related to performance (which we will discuss and compare in the following sections) rather than a general discretion to disclose regulatory information.

Legal frameworks often mandate regulators with the duty of non-disclosure. This is found in all of the three jurisdictions. The regulator's duty of non-disclosure is often perceived as a counter balance to its powers in acquiring information (discussed in the previous section). However, if the duty of non-disclosure is too broadly construed, it may act as an impediment towards transparency.

¹⁶²⁷ See section 4.3.5

In England, restriction from disclosure is imposed through WIA.¹⁶²⁸ WIA s.206 clearly indicates that information acquired by virtue of the regulator's powers under the act which pertains to the affairs of individuals or businesses shall not be disclosed. A similar restriction applies in Victoria, for information acquired through the powers granted by s.37 and s.37A of the ESC Act. The restrictions come with qualifiers, for example, if consent is given by the supplier of information (England) or if it is required to facilitate the performance of the regulators' functions (England) or if the 'public benefit' outweighs the harm (Victoria).

In Jakarta, the strict formulation of the confidentiality clauses renders public disclosure virtually impossible. The contract only allows the disclosure of technical and commercial information¹⁶²⁹ to third parties if such third parties enter into a confidentiality agreement with the discloser. Furthermore, such engagements must be approved by all parties to the Cooperation Agreement. As a result, only limited and specific disclosure to third parties is permitted, but "public" disclosure is impossible. The regulatory body, JWSRB, is instituted under the contract and reinforces this confidentiality policy in its mandate. Hence, although it is not a party to the contract, it is prohibited by its statute from disclosing information.

7.2.5. Investment and Price Determination

¹⁶²⁸ See section 5.3.5

¹⁶²⁹ See section 6.4.6

In Victoria, every investment plan for the upcoming regulatory period is stipulated in each utility's "Water Plan".¹⁶³⁰ Utilities are required by their SOO to submit a water plan, for the purpose of price determination. The Water Plan is published on each utility's website and the ESC, although there is no specific obligation to do so, but each utility's SOO contains an obligation for the utility to "*develop and implement open and transparent processes* in its planning stage. As a matter of regulatory practice, the draft Water Plan is being released for discussion for a one month period to provide opportunities for commenting before the final draft water plan is submitted to the ESC. There is no exact mechanism regulating the publication of this draft water plan and the one month period is too short to allow informed participation. Utilities are also required to submit corporate plans to the treasurer. There is no obligation to publish the corporate plan, but there is an obligation to have it ready for inspection, upon request. When the ESC finally makes determination, there is a legal obligation to include a statement of purpose and the reason for making such determination and the notice must be published in the Government Gazette, daily newspaper generally circulating in Victoria *or* on the internet.

In England, the primary transparency tools in investment and price determination are the publication of companies' Five Year Business Plans, and annual June Return. There are no legal requirements to publish these plans, but the company websites publish them and OFWAT's website compiles the links. OFWAT also publishes each company's leakage target in its five-yearly Price Determination.¹⁶³¹ There is also a yearly monitoring of each company's leakage target. If companies fail

¹⁶³⁰ See sections 4.3.6 and 4.3.7

¹⁶³¹ See section 5.3.8

to achieve leakage targets, OFWAT will “name and shame” them in its annual report or if it is serious, categorise it as breach of its licence condition.

In Jakarta, there is no such investment planning process. Unlike in Victoria and England, Jakarta concessionaires are not required to submit periodical investment plans that the regulator must approve for the purposes of price determination, because they are paid directly based on the volume of water delivered to consumers’ taps.¹⁶³² Investment targets are not determined periodically in the regulatory process like in Victoria and England, but are already contained in the Cooperation Agreement. This includes a five year investment programme and an annual Investment and O/M program (which must be approved by PAM Jaya – not JWSRB). There are obligations to extend the network which forms a part of “technical targets”. This five-yearly and annual investment plan is not disclosed to the public and there is an impediment to doing so due to the confidentiality clause. Tariffs are determined separately by the Governor. The national law has a relatively transparent tariffication method but is deemed inapplicable to the Jakarta concession.

Ideally, investment (and service levels) should reflect consumer demand and therefore be appropriately reflected in prices, as is done through various stakeholder participation mechanisms preceding price determinations in England and Victoria. However, in Jakarta, the “water charge” system and the contractually pre-determined investment targets disconnect prices from politics, as they put investment matters into the hand of PAM Jaya themselves without public involvement. This situation can be slightly improved if, at the very least, the five year approval process of investment

¹⁶³² See sections 6.4.8 and 6.4.9

targets is conducted publicly and all investment plan documents are published. However, such a measure would require contractual amendment on the part of the confidentiality clauses and the reforming of Jakarta's regional by-laws regulating PAM Jaya and water services in Jakarta. The former would require agreement from the private sector and the latter requires strong political will from the local councillors.

7.2.6. Service Levels and Customer Service

The transparency of service levels and customer service standards is required so that customers would be able to exercise their rights and utilities would have an incentive to comply. In both England and Victoria, there are obligatory publication requirements on service standards and customer service.

In England, information on both service levels and customer service standards is regulated in a Statutory Instrument (the "GSS Rule") and so they are available to the public. In addition, utilities must enact a code of practice, based on the GSS Rule, to be approved by OFWAT. An important transparency mechanism in England is that in the company's licence condition, OFWAT requires that such code and any substantive amendment thereof be put to the attention of customers, its copies made available for inspection and anyone requesting it should be able to obtain it free of charge.¹⁶³³

In Victoria, the service standard is regulated through the Customer Service Code (CSC).¹⁶³⁴ Utilities must enact and publish a customer charter which is

¹⁶³³ See section 5.3.6

¹⁶³⁴ See sections 4.3.8

formulated based on the CSC. The guaranteed service level compensation, however, is not mandatory. If utilities choose to enact them, they must be approved by the ESC and published as a part of the CSC.

Jakarta has no published service levels and customer service standards. Jakarta has by-laws regulating water services, but the by-laws barely regulate service standards.¹⁶³⁵ Albeit with less detail than England and Victoria, the national law broadly regulates some guarantee on service levels but this is deemed inapplicable to the concession. The Cooperation Agreement regulates some service standards and guaranteed payments on service levels, but it is confidential.

Service levels and customer service standards in England and Victoria are transparent, partly because they are part of the regulatory instruments. The GSS Rule (England) is a Statutory Instrument, and the Customer Service Code (Victoria) is a code enacted by the regulatory body, empowered to do so by the ESC Act. Conversely, in Jakarta, they form part of the Cooperation Agreement. Even without the confidentiality clause, as a private arrangement, a contract would be less transparent compared to a secondary legislation (the English GSS Rule) or a code (Victoria's CSC) due to the negotiatory nature of any service level improvements which restricts direct involvement from the public. On the other hand, there is greater opportunity for public involvement if service levels are regulated in instruments such as the English GSS and Victoria's CSC.

Another reason why England and Victoria is more transparent than Jakarta is because in addition to stipulation of service standards in a regulatory instrument (in

¹⁶³⁵ See sections 6.4.7

a Statutory Instrument or in a Code), there is a legal obligation to further disseminate the service standard information in the form of a customer charter (Victoria) or code of practice (England). These charters and codes are drafted based on the empowering regulatory instrument, but in a language which is simpler and more understandable than a legal instrument.

7.2.7. Non-compliance

In Victoria, the two types of enforcement mechanisms, provisional and final ‘orders’, require publication in the Government Gazette.¹⁶³⁶ In England, it is much more detailed as transparency is applied to every enforcement stage and type of orders. Enforcement Orders must be preceded by a published notice, clarifying the violations, points of the licence condition or other regulatory instrument being breached and what is required to cease the violation.¹⁶³⁷ If an undertaking is to be provided, a published notice is also required. Likewise, if a fine is to be imposed, a notice must be published specifying the proposed amount of penalty, the acts or omission which is deemed to constitute a contravention, supporting facts and justification and a period for the utilities to make an objection.

Jakarta is the least transparent. The Cooperation Agreement regulates that concessionaires are obligated to pay penalties for violation of customer service and service level standards, and such payment must be made *directly* (by the concessionaire) to the consumer, in the form of rebates. However, this has never been disclosed and has prompted a polemic between the regulatory body and PAM

¹⁶³⁶ See section 4.3.9

¹⁶³⁷ See section 5.3.7

Jaya.¹⁶³⁸ PAM Jaya may have incentives towards non-disclosure since the payment of compensation could decrease its income from the concession, which is used to repay its debt to the concessionaire, despite the fact that such compensation and rebates must be paid directly to the customer. The Cooperation Agreement contains no obligation to publish non-compliance or enforcement. Disclosure on non-compliance is also prohibited by the confidentiality clause. Matters of non-compliance are settled bilaterally between PAM Jaya and its concessionaires.

7.2.8. Redress

Victorian water utilities are obligated by their licence conditions to enter into a dispute resolution scheme. The industrial ombudsman EWOV is currently referred to as the dispute settlement body in the Customer Service Code. The existence of EWOV as a private body may pose an accountability problem on its own¹⁶³⁹; however, to the extent that information pertaining to redress is communicated, Victoria is relatively transparent. The CSC requires utilities to inform customers about referral to EWOV and other available dispute settlement mechanisms.

In England, both OFWAT and CC Water have complaint handling functions.¹⁶⁴⁰ CC Water will only interfere if water companies have been given the opportunity to address the complaint. Similar to Victoria, there is an obligation for

¹⁶³⁸ See section 5.4.10

¹⁶³⁹ See section 4.3.10

¹⁶⁴⁰ See section 5.3.10

¹⁶⁴⁰ See section 5.3.10

the utilities to describe how complaint handling works in the water industry, the functions of CC Water and how they can be contacted.

In Jakarta, a regulatory redress mechanism is virtually non-existent, except for some issues related to inaccurate water metering¹⁶⁴¹ and water theft penalties. By-law 11 also provides no alternative recourse mechanism for customers to go to Court. The previous sections mentioned that there are some service level guarantees and compensation mechanisms in the Cooperation Agreement. However, customers have no direct recourse to this, as they are not a party to the contract.

Service levels, customer service, non-compliance and a redress mechanism are a continuum. The first two determine the content of the rights and the last two determine how they can be enforced. Jakarta is lagging behind in all of the four aspects, but especially in a redress mechanism: it hardly exists. In order to be transparent, the content of the rights and how they can be enforced must be communicated to the public. This is a legal obligation in England and Victoria, but not in Jakarta.

7.3. Utilities' Corporate Governance

7.3.1. The Board and its accountability

¹⁶⁴¹ See section 6.4.10

From all three jurisdictions, basic corporate information¹⁶⁴² is available through the companies themselves or the company regulator (or other administering body) for a fee. Listed companies generally have more disclosure requirements than privately-owned companies. In England, quoted companies must publish their annual account and report on their corporate website free of charge.¹⁶⁴³ Thus, if the utilities are not quoted companies, they are not subject to these rules, unless they are required by OFWAT to comply with capital market disclosure rules as if they are listing their equities.

In Victoria, the obligation to disclose the directors' report and financial report is only towards members and not the general public.¹⁶⁴⁴ However, the Victorian water retailers are under an obligation to disclose those reports to the parliament under the SoE Act.

The situation in Indonesia is similar. Directors of a company must produce an annual report but these are only delivered to the shareholders, except if they are listed (which is the case – for the time being – for Palyja and Aetra due to their bond issue), then they are required to disclose their audited financial accounts annually in newspapers.¹⁶⁴⁵ However, there is no obligation to disclose their annual report to the public. PAM Jaya – which is governed by the regional SoE Law – has even lower reporting standards compared to the concessionaires. PAM Jaya is only required to

¹⁶⁴² England: CA s.162 (5) (Directors Register), CA s.116 (1) (Register of Members), Victoria: Corporations Act 2001 s. 205 B. Indonesia: Peraturan Menteri Hukum dan Hak Asasi Manusia Nomor M.HH-03.AH.01.01 Tahun 2009

¹⁶⁴³ See section 5.4.2

¹⁶⁴⁴ See section 4.4.2

¹⁶⁴⁵ See section 6.5.1

report to the Governor its “profit and loss account” and this should later be reported to the parliament as part of the Governor’s general accountability report.

For directors’ appointments, the Victorian legal framework is less clear. The Three Retailers are governed by the Corporations Act and the Act only regulates appointments in general, the details of which are left to resolutions. The author is not able to obtain such resolutions, although in theory they should be tabled at the parliament and therefore recorded on the Victorian Government Gazette. However, the practice of appointment is quite transparent, the vacancies are announced on the DSE’s website, outlining the selection criteria and its process and the procedure for applying.

Jakarta’s By-law 13 only prescribes that directors are appointed by the Governor, and there are no rules governing the prerequisite of directorship and the appointment process.¹⁶⁴⁶ For Palyja and Aetra, their directors are appointed by the General Meeting of Shareholders, and can be dismissed through a resolution. According to the capital market rule, a change in directorship in Palyja and Aetra must subsequently be announced to the public.

There are three important lessons. First, as demonstrated by the Jakarta case of PAM Jaya, public ownership of water utilities is not a guarantee for transparency if the rules governing public utilities are under-reformed. In order to increase transparency, the Jakarta by-law regulating PAM Jaya needs to be reformed in order to raise the reporting threshold, followed by the public disclosure of such reports and

¹⁶⁴⁶ See section 6.5.1

tabling at the local parliament. Second, corporatisation may indeed increase disclosure by water utilities, but the transparency mechanism in general corporate law is geared toward *members*, and not the public at large. As such, corporation law can be used to facilitate transparency, only when there are further requirements to publicly disclose information which is disclosed to members (as applicable to Victorian SoEs). Third, listed companies do have more disclosure requirements compared to ordinary companies, both in terms of the types of information which should be disclosed and the obligation to disseminate such information. However, utilities may no longer be bound by those disclosure rules if they delist themselves from the capital market. Hence, capital market rules can be used to facilitate disclosures in utilities, but in order for transparency to be sustainable, regulators must have powers (or contracts must contain provisions) to impose requirements that utilities would still be subjected to those rules, even when they decide to delist themselves.

7.3.2. Related Party Transactions

From all three jurisdictions, accounting standards generally impose higher disclosure requirements for related party transactions, compared to the default disclosure requirement found in each country's company laws.¹⁶⁴⁷ In Indonesia, the

¹⁶⁴⁷ In Indonesia, the Company Law does not require disclosure of related parties, the accounting standards do. (See Undang Undang No.40 Tahun 2007 Tentang Perseroan Terbatas and Ikatan Akuntan Indonesia, *Pernyataan Standar Akuntansi Keuangan (PSAK) No. 07: Pengungkapan Pihak Pihak Berelasi*). In the UK, disclosure is required by the company law, for related party transactions made not under normal market conditions, however, the FRS 8 requires disclosure of all types of related party transactions, irrespective of market conditions. (See SI 2008/410 para 72 (1) and compare with Accounting Standards Board, *Amendment to FRS 8 Related Party Disclosures: Legal Changes 2008*). In Australia, The Corporations Act's definition of "related parties" (See Corporations Act 2001 s.210)

Company Law does not require disclosure of related parties but the accounting standards do. In the UK, disclosure is required by the company law, for a related party transaction made not under normal market conditions, however, the FRS 8 requires disclosure of all types of related party transactions, irrespective of market conditions. In Australia, The Corporations Act's definition of "related parties" is narrower than the Australian Accounting Standards Board, AASB 124.

Capital market rules also generally require more disclosure threshold than company law, as is the case in Jakarta, but its applicability to water utilities will cease when they delist their equities or debt from the capital market. Thus, subjecting water utilities to accounting standards may increase transparency on related party transactions. Company laws generally refer to each jurisdiction's accounting standards; such linkage is strong in England and Victoria but is weak in Indonesia. Therefore, ideally, regulators should be empowered with the ability to require utilities to comply with certain accounting standards.

Regulators in Victoria and England impose regulatory accounts on utilities. In both jurisdictions, Related Party Transactions are a part of regulatory accounts which are confidential. In Jakarta, there are no specific regulatory accounts which utilities must submit to regulators; the Cooperation Agreement subjects utilities to prevailing general accounting standards. This is unfortunate, as regulatory accounts are much more specific in focusing on business and industry information rather than general corporate information as imposed by statutory accounts.

is narrower than the AASB's (See Australian Accounting Standards Board, *AASB 124, Related Party Disclosures*). See sections 4.4.2 (Victoria), 5.4.2 (England) and 6.5.2 (Indonesia/Jakarta).

However, in both England and Victoria, Related Party Transactions form the confidential part of the regulatory account. This could be detrimental for transparency, as one of the benefits of disclosure of related party transactions in regulatory accounts is for customers to be able to track companies' possible anti-competitive behavior.¹⁶⁴⁸

The excision of related party transaction documents in England is subject to some categories¹⁶⁴⁹ developed out of regulatory practice. Such invocation, however, appears to be arbitrary, as there is no consistency between companies although the information sought for confidentiality is similar, i.e. information on related party transactions. Some categories such as “security risk” are arguably reasonable, but other categories such as those where disclosure will provide third party commercial advantage (Category 4) must be subjected to a balancing test with the general purpose of regulatory account disclosure discussed above.

Victoria is more secretive than England with regards to its related party transaction confidentiality policy, as it provides no attempt to justify why such information is confidential. Furthermore, if the English style excision category is applied to Victoria, it will have less justification to impose confidentiality than its English counterparts due to its legal form as a state-owned company.

7.3.3. Corporate Restructuring

¹⁶⁴⁸ Inter-Regulatory Working Group, *The role of regulatory accounts in regulated industries, A joint consultation paper by the Directors General of Of tel, Of gem, Of wat, Electricity & Gas Supply (Northern Ireland), Rail Regulator and Civil Aviation Authority*

¹⁶⁴⁹ See England Case Study Section 4.3.5 on “OFWAT’s General Disclosure Policy” and “Related Party Transaction” section 4.4.2

Transparency mechanisms are used in the regulatory process to gather information from the public on the credibility of the new owners, in understanding the consumers' views and to deal with the effects of corporate restructuring.

In England, there is a good practice of publishing "Consultation papers"¹⁶⁵⁰ detailing the process of restructuring. OFWAT does not have any power to block acquisition, but information and views generated from the consultation process is then used by the regulator in modifying utilities' licences. The Jakarta regulator has the power to block acquisition if the transfer of shares involves more than 51% of total shares. Unfortunately, it did not conduct any consultation process during past acquisitions. In Victoria, all utilities' shares are currently owned by the State Government and there is constitutional entrenchment in retaining the status of public ownership.¹⁶⁵¹ Any attempt to transfer utilities' shares to a private entity which changes its nature as a public entity will therefore require parliamentary approval.

Some restructuring in England had caused the delisting of equities from the stock exchange. To compensate for the loss of information used in comparison, OFWAT requires the publication of the utility's financial information as if it were listed and subject to the rules of the stock exchange.¹⁶⁵² In England, utilities' accounting statements, auditors' report and annual accounts must be published and copies made available to customers upon request.

¹⁶⁵⁰ See section 6.5.3

¹⁶⁵¹ See section 4.4.3

¹⁶⁵² See section 5.4.3

7.4. Passive Disclosure Rules

7.4.1. Applicability

Regulators in England (including OFWAT) and Victoria (including ESC) are subject to the provisions of FoI laws, but in Jakarta there is disagreement whether the FoI law applies to JWSRB. The main reason for this is because, unlike OFWAT and ESC, the JWSRB is an entity established under a contract. The JWSRB does have a legal mandate under a Governor Regulation, but it suffers from some problems, namely, that the mandate itself lacks regulatory power and this prevents it from being categorised as “*related to the organization of the state*”.¹⁶⁵³, the legal form of the mandate as a Governor Regulation is considerably weak under the Indonesian legal system and there are technical legal defects which may cause the mandate to be unenforceable. Due to the above, the argument that JWSRB is a public body becomes less compelling.

Victorian water utilities, being state-owned companies, are covered by Victorian FoI. Conversely, FoI is not applicable to water utilities where services are carried out by the private sectors such as in England and Jakarta. This appears to support the thesis that ‘privatisation’ decreases the level of transparency of the decision making process in the water sector.¹⁶⁵⁴ Nevertheless, there are various dimensions to “transparency”.¹⁶⁵⁵ Delegation to the private sector does not necessarily result in the decrease of all of those dimensions. “Availability” of information to regulators may actually increase, as demonstrated by the England

¹⁶⁵³ See section 6.6.1 also on JWSRB see section 6.1.3.4

¹⁶⁵⁴ On general discussion about transparency and private sector participation see sections 1.1.1 and 2.1

¹⁶⁵⁵ See section 2.6

case study. Thus it is more suitable to say that delegation to the private sector has the potential to obstruct information from being accessible to the public.

In England, water utilities are not covered by the FoI Act, but there are growing pressures for utility companies to be covered by it, through designation by the Secretary of State.¹⁶⁵⁶ The rationale is that utilities, including water, provide essential services and there is a public interest in knowing how the companies deliver their services. At the moment the UK Government still considers that information about utilities is adequately accessible via regulators and, therefore, has not included utilities in the initial s.5 designation, although they are strong candidates for inclusion in the future. Another strong point for subjecting water utilities to the FoI Act is because of OFWAT's plan to move towards risk-based regulation in an effort to reduce its (and utilities') regulatory burden. In practice, this would mean a decrease in the amount of regulatory information made available in the public domain, as utilities would no longer be required to submit their June Return. With fewer regulatory burdens and more reliance on self-regulation, additional public scrutiny via the FoI Act is the appropriate counter-balance.

The application of the UK's EIR to water utilities is problematic. This is because, unlike the FoI Act which lists a number of public bodies in its schedule, the EIR relies on the legal interpretation of several terminologies, namely, whether the body carries *functions of public administration* or it is acting "*under the control*" of other public bodies with some environmental functions. Water utilities fail on both tests.

¹⁶⁵⁶ See section 5.5.1 above

The interpretation of both of the elements above relies heavily on the UK's internal experiences and is influenced by the UK's regulatory psyche. For example, the Upper Tribunal in *Smartsource* explicitly recognises that water utilities have some “administrative” functions but it denies that such functions are “functions of public administration” under EIR.¹⁶⁵⁷ If these are not functions of public administration, then what are they? The Upper Tribunal in *Smartsource* does not say anything. However, in *The Duchy of Cornwall*, the first trial tribunal interprets *Smartsource* and suggests that water utilities do indeed have “functions of public administration” but since these functions are ancillary to the ultimate “commercial” functions they are not regarded to be a public authority under EIR. This is another blunder: if the first tier tribunal has acknowledged that the body carries “public administrative functions”, then should it not be straightforwardly covered by the EIR? The Aarhus Convention clearly does not distinguish whether the function of public administration is ancillary or primary.

As for *under the control*, the Upper Tribunal suggests that “regulation” is not a “control”. For them, a “control” would mean ‘command and compulsion’ within which both the means and outcome are dictated by the state, whereas in “regulation”, the entity is positioned at arms-length from the state's machineries, whose function is restricted to “*formulating policy and strategy, determining outcomes, setting standards, making and enforcing rules and issuing guidance*”.¹⁶⁵⁸ For this argument, the strong pressure for differentiating between “regulation” and “control” is visible, and this is highly influenced by the UK's long time experience

¹⁶⁵⁷ See section 5.5.1.2

¹⁶⁵⁸ See section 5.5.1.2

with privatisation and regulation. This is despite the fact that the Aarhus Guide provides a strong indication that high regulation of companies exercising environmental functions such as water utilities can be regarded as “control”.

The status of the concessionaires in Jakarta is also similarly elusive. While they are not straightforwardly covered by the Indonesian FoI Law as a government entity, the FoI Law could also be applicable to “*non-governmental*” entities whose budget is derived partially or in its entirety from the state or regional budget or from foreign contribution.¹⁶⁵⁹ This is possible in the Cooperation Agreement, in cases where the tariffs collected are smaller than the “water charge” that must be paid to the operators. The remaining “shortfall” must be paid by PAM Jaya. If the payment of such a shortfall is derived from the state or regional budget, then this will trigger application of the FoI Law. Indeed, PAM Jaya currently owes a great deal of money to the concessionaires, the repayment of which can only be derived from state or regional budgets.

Secondly, the concessionaires can be categorised as bodies (other than the executive, judiciary or the legislative), whose “*main tasks are related to the organization of the state*”.¹⁶⁶⁰ Unlike in the UK, there has never been any decision to delegate entirely water services to the private sector as it is constitutionally forbidden. Any authorities vested in the concessionaires are derived from the Cooperation Agreement, but can only exist if it is sourced from public law. The primary sources of these are the regional by-laws. Hence, the concessionaires are effectively exercising a function “*related to the organization of the state*”. This

¹⁶⁵⁹ See section 6.6.1.2

¹⁶⁶⁰ See section 6.6.1.2

argument, however, is dependent upon whether the concessionaires receive portions of the state or regional budget.

Comparing the three jurisdictions above, we can tell that jurisdictions which rely on the applicability of FoI by way of definition (UK's EIR and Indonesia's FoI) will require lengthy legal interpretation in determining whether non state entities involved in regulation of water services is covered by its access to information regimes. The situation becomes difficult when it involves the delegation of public services to non-state entities. As *Smartsources* had demonstrated, the debate is confined to whether water utilities fit the legal technical definition of "*functions of public administration*" or "*acting under the control*", while the wider public policy problem of accountability arising out of the delegation of water services to the private sector in which such service is crucial to the fulfilment of human rights and its users often have limited or no ability to switch to another provider/seller were not considered.¹⁶⁶¹ Such public policy concerns would have been more effectively considered through public consultations carried out by a "designation" system such as the UK's FoI, rather than debates on statutory definitions.

Such an inapplicability problem, in a way, mirrors the concern of authors such as Swyngedouw and Minow on the possibilities of information being

¹⁶⁶¹ Various authors had elaborated why an access to information regime needs to cover utilities, see Al'Afghani, 'The transparency agenda in water utilities regulation and the role of freedom of information: England and Jakarta case studies' Calland, 'Transparency in a Profit Making World' Palast, G. and others, 'Democratic regulation a guide to the control of privatized public services through social dialogue : working paper' <<http://ilo.org/public/english/dialogue/sector/papers/pubserv/demreg.pdf>> accessed 2000 Palast, Oppenheim and MacGregor, *Democracy and Regulation: How the Public Can Govern Privatised Essential Services*

“privatised” following the “privatisation” of services.¹⁶⁶² The crux of the problem, however, lies not with the decision to delegate services to non-state actors, but with the unpreparedness of the access to information regimes and the body of administrative law in answering such delegation challenges. The general view is “either-or”: either an entity is an extension of the state and therefore covered by an access to information law, or not at all. This was shown in the debates in *Smartsource* in which a counsel argued that in order for a function to be of public administration it “*must be an extension of the state system of public administration*” and that “*regulation was intended to cover executive governmental processes in all their guises*”.¹⁶⁶³ What about non-state entities with state-like power? The jurisprudence does not seem to have an adequate answer to this because they were created in the age where the state was the centre of accountability, whereas these cases emerge in the age where the state is in “retreat” and the locus of power is partially transferred from the state to corporations.

Since water utilities are already faced with a high degree of regulation and accountability requirements under sectoral rules, it is only reasonable that general access to information regimes follow suit. Legal interpretation of the phrase “public bodies” with the backing of case law cannot be relied on for the reasons mentioned above. Any reform measures to cover non-state actors under access to information laws or any other accountability generating mechanisms must be specifically stipulated in legislation.

¹⁶⁶² See Literature Review section 2.1

¹⁶⁶³ See section 5.5.1.2

7.4.2. Exemptions

From the three jurisdictions compared, the Indonesian FoI Law is generally the most pro-disclosure. The law has narrow exemption clauses, balancing tests applicable for all of its exemptions and contains no exemption on information obtained in confidence. The Victorian and UK FoI Acts have broad exemptions, some of which may be either absolute or qualified (do not require harm and/or public interest test) and as common law countries, contain exemptions on obligation of confidence.

Five types of exemptions clauses were compared, as they are deemed to be relevant in water utilities' regulation¹⁶⁶⁴: law enforcement and investigation, decision making and policy formulation, obligation of confidence, commercial information and Intellectual Property Rights.

7.4.2.1. Law enforcement and investigation; decision making and policy formulation

For law enforcement and investigations, Indonesian water utilities' stakeholders will benefit from the narrow exemption clause, as it only deals with criminal proceedings or if the exemption endangers the life of law enforcement officials or jeopardises law enforcement facilities.¹⁶⁶⁵ Civil and administrative (including regulatory) investigations are not covered by the exemption. Conversely, in England and Victoria they are covered as it uses broad terminologies such as

¹⁶⁶⁴ See Theoretical Framework section 2.4

¹⁶⁶⁵ See section 6.6.2.1

“proper administration of the law”¹⁶⁶⁶ (Victoria) or “investigation” and ‘charged with an offence’¹⁶⁶⁷ (England) and this covers investigation for “regulatory offences”.

Indonesia has no exemption on policy formulation, although it has exemption for “confidential memorandum”. Victoria has exemptions for “internal working documents” which comprise of recommendation, advice, opinion, consultation or deliberation. The UK FoI and EIR also has exemptions for ‘formulation’ or ‘development’ of government policy and “the effective conduct of public affairs”. The exemptions in Victoria and England are wide, and may cover all sorts of formulation and development of policies on water services. Conversely, Indonesia’s FoI exemption is narrow, as it only protects memoranda, but not other policy documents.

7.4.2.2. Obligation of Confidence, Commercial Information

“Obligation of confidence” can be a serious deterrent to transparency in water utilities’ regulation, as it is applicable not only to natural persons, but also to corporations. Again, Indonesian stakeholders benefit from the non-existence of law of confidence in its legal system. In both Victoria¹⁶⁶⁸ and England¹⁶⁶⁹, this law exists and as such their FoI Acts provide for its exemption. Both in England and

¹⁶⁶⁶ See section 4.5.2.2

¹⁶⁶⁷ See section 5.5.2.1

¹⁶⁶⁸ See section 4.5.2.4

¹⁶⁶⁹ See section 5.5.2.3

Victoria, information generated jointly by the government and a third party is not considered to be “submitted in confidence”.

All three jurisdictions compared have an exemption for “commercial information” and all are subject to ‘harm’ test. A leading case in Australia is from Queensland¹⁶⁷⁰, in which the information commission interpret harm to include the loss of “goodwill” if it amounts to the loss of customers to a competitor and eventually leads to the loss of profit. In all three jurisdictions there is a reference to a company’s “competitive edge” in considering harm, but this is not clearly manifested in the UK.¹⁶⁷¹ The consideration of competitive edge is particularly interesting given that water utilities operate in a natural monopoly environment: there is no competition in its service area.

An important note on the Queensland case is that it considered if the company is operating in a monopoly context, which renders ‘harm’ caused by disclosure to become less relevant. Victoria’s FoI Act requires that “substantial harm to the competitive position” or “competitive disadvantage of an undertaking” is one of the elements to be considered in maintaining the exemption. The Indonesian FoI Law only provides exemption where disclosure would “*jeopardize the protection of intellectual property rights and protection from unhealthy competition*” and the elucidation clarifies that the purpose of such exemption is to protect healthy competition.¹⁶⁷² The English FoI Act contains no such consideration, although the

¹⁶⁷⁰ See section 4.5.2.3

¹⁶⁷¹ For Victoria, see Freedom of Information Act 1982 (Vic) s.34(2) a and c Also, Undang Undang No.14 Tahun 2008 Tentang Keterbukaan Informasi Publik Article.17.b. FoI Act 2000 (England) s.43 (2) contain no such provision, although ‘competition’ is considered in the Guideline, See , *Freedom of Information Act Awareness Guidance No. 5, Commercial Interests (Version 3)* p.4.

¹⁶⁷² See section 6.6.2.2

guideline requires weighing the industry's competition level and recommends that prejudice to commercial interest is less likely to occur if the company enjoys a monopoly. An earlier DTI Green Paper on utility regulation also proposed that the degree of disclosure should be linked to the entity's degree of competition and that a monopoly business should be generally disclosable.¹⁶⁷³

As such, the English FoI Act exemption is the broadest compared to Victoria and Indonesia as it only requires that disclosure “*would, or would be likely to prejudice*” commercial interests, without requiring any consideration as to whether the market is competitive. A “prejudice” would suffice.

In practice, the idea that utilities' natural monopoly is a perfect justification for disclosure is not always true, as demonstrated by a Scottish case.¹⁶⁷⁴ The Scottish FoI Commissioner maintains exemption in a case involving a disclosure request to Scottish Water – a state-owned company – as the charges collected from the information request are considered for the Public Interest: it may contribute in decreasing the overall water and sewerage charges. Contrary to what critics often said, the commodification of information in this particular case may actually serve the Public Interest, in the form of lowering consumer charges.

A challenge for the FoI Commissioner is in determining the ‘relevant market’ since the market for information could be distinguishable from and may not necessarily influence the market for water supply. If disclosure serves only the particular undertaking whose business is confined to services in the market of information, and it has no influence whatsoever in expanding consumer choices or

¹⁶⁷³ See Literature Review section 2.1

¹⁶⁷⁴ See section 5.5.2.2

in increasing competition in the market of water supply, then the exemption would be justified. Conversely, if disclosure has implications for the increase of competition in the water supply market or in decreasing consumer charges, then exemption should not be justified. Nevertheless, any Public Interest argument towards increasing competition in the water supply market would require sufficient backing from a liberalisation policy. If, in that particular jurisdiction, there is not yet any policy to liberalise and introduce competition in water supply then the argument of Public Interest through disclosure will have no merit.

8. CONCLUSIONS

8.1.1. Transparency: motivation and competing interests

As section 1.1.1 has argued, transparency is a prerequisite to good governance. It enables citizens and regulatory stakeholders to participate in the regulatory process and for regulators and utilities to be held accountable for their actions. By increasing accountability, transparency helps in combating and preventing corruption, which, according to some reports, is rampant in water services provision, especially in the developing countries. As such, transparency will also increase the legitimacy of regulatory systems. Furthermore, transparency is also a prerequisite in materializing the human right to water. The recent developments to the human right to water operationalise transparency in water services provision and seek to restrict the use of confidentiality provisions.

Combined with participatory mechanisms, such as by providing comment on utilities' corporate and investment plans or regulators' draft determinations, information received by the regulator from the public will be beneficial for the regulatory process. Section 1.1.2 has elaborated that regulators will arrive at better decisions through exchanges of opinion with the public, and information from the public will decrease the costs of finding information on behalf of the regulator. Thus, other than providing for democratic regulation, transparency can also increase the quality of regulation and lower the regulatory burdens.

In sum, the justification for transparency can either be normative (such as for fulfilling human rights or providing democratic regulation) or descriptive (such as in reducing regulatory burdens and fostering competition). The thesis is not aimed towards evaluating the validity of such justifications and chose to treat them as the

underlying assumptions used in the thesis. However, as will be elaborated below, the thesis acknowledges that there may be competing interests in transparency.

Since there is no single regulatory objective and no single principal in regulation, but rather a series of principal-agent relationships, transparency must be aimed toward the public (see Section 2.3). The thesis has provided examples that information which is useful for economic regulation (such as the June Return) is also useful for public accountability. Likewise, information required by downstream businesses may also have an impact on competition, which should eventually benefit consumers. Therefore, public disclosure serves multiple purposes and multiple stakeholders.

Nevertheless, there may be a competing interest in transparency, especially for entities which become the primary loci for transparency initiatives, such as utilities and regulators. As the preceding case studies demonstrate, utilities usually put forward arguments relating to the protection of commercial information while regulators typically forwards the arguments of “free and frank exchange of opinion”. Freedom of Information (FoI) legislation usually contains clauses which protect certain interests from disclosure. As demonstrated in the Victoria case study, this protection granted by FoIs can also be used as guidance in active disclosures. Depending on the jurisdiction, an exemption clause might be strong or weak.

One must first evaluate whether such interest towards confidentiality is legitimate. Sections 5.5.2.2 and 7.4.2.2 have explored a proposal which seeks to increase the burden of disclosure based on market power, in which higher market power entails more disclosure. Meanwhile, from another point of view, confidentiality in a natural monopoly situation is considered as an oxymoron as no competition is present. Thus, generally speaking, in water utilities where there is an absolute monopoly, confidentiality may not be legitimate. Nonetheless, as the MacRoberts case

demonstrates, this principle is also not absolute. In situations where disclosure can be associated with an increase of customer charges, exemption(s) might be granted.

After it is discovered that there is a legitimate interest, a balancing test must be employed before a disclosure is made. There is no one-size-fits-all-solution for a balancing test in disclosure cases. It all depends whether FoI and corresponding legislation protects a certain interest. Some legislation protects all commercial information from disclosure and some others protects business from unfair competition. The former accords more protection from disclosure than the latter because the latter requires competition to exist for the protection to take place – which may not be relevant in some natural monopolies, whereas the former is also relevant in monopoly setting. The thesis has explored disclosures in relation to commercial information and found out that the form of ownership, the level of competition, the existence of a statutory mandate to increase competition in the water sector, the relevant market for information disclosure and how such disclosure would contribute to the public interest would be among the factors which must be considered before a disclosure is made.

8.1.2. How legal frameworks can enable transparency in water utilities' regulation

The research question posed at the beginning of this thesis is: “*How can Legal Frameworks Enable Transparency in Water Utilities' Regulation?*” The thesis found that irrespective of the regulatory or ownership model used in any given jurisdiction, legal frameworks could enable transparency in the following ways.

In terms of the policy in involving the private sector, legislation must clarify the extent and breadth to which the private sector's involvement is allowed and the political and accountability mechanism in approving such involvement. For example,

if the scope of the PSP includes all segments of the water cycle from abstraction, treatment to retail distribution such as Jakarta's concession, the accountability threshold must be higher than simple build-operate-transfer projects for water treatment plants. In addition, the procurement method must account for the loss of accountability and transparency due to contracting out as risk. A business to government (such as Victoria's Wonthaggi Desal Project), rather than business to business (such as the Jakarta concession) contracting scheme is preferable for large scale and significant PSP projects.

After the contract is concluded, information on performance must be available. To enable transparency, freedom of information (FoI) laws must be adequately integrated with procurement policies and legislation. Government contracts must contain "waiver clauses" which would render contractual confidentiality clauses inapplicable in the event of an FoI request to contracting public bodies or when there are other mandatory disclosures required by law. Finally, all contracts must be published in full. Redaction should be allowed only if there is significant harm and a public interest not to disclose information. Any redaction should be accompanied by justification, published, and limited only to a certain period.

For regulatory decision making, regulations must clearly stipulate the types of licences, the criteria and mechanism for applying licences, licence conditions and the effect of violations. Licences must be published. Regulatory bodies' composition, structure, term of office, prerequisite of appointment and removal mechanism for members, must be clearly stipulated and published. Regulators must have a conflict of interest policy and publish a register of disclosable interests. Regulators must also be empowered with sufficient means to acquire information from regulated utilities. Typically, this is in the form of "reporting duties" (submission of accounts based on

standardised regulatory accounts and performance reporting) and “investigative powers” which would allow regulators to inspect utilities’ premises and conduct audits. Mechanisms must also be available for regulators to reveal information from unregulated third parties who have involvement with utilities’ operations. Regulator must also have wide discretionary powers to publish information in the public interest, which outweigh any other contractual or private law obligation owes to the utilities. Regulators should have the final say in determining whether information from utilities can be disclosed to the public. Regulators should also enact and publish a disclosure policy.

The rationale behind investments and price determinations must be published. This entails the publication of utilities’ business plans. Service Levels and Customer Service Standards must be published. Utilities must be obliged to ensure that customers understand their rights. Information on utilities’ non-compliance with regulatory standards must be available in the public domain. Any regulatory sanctions imposed on utilities must have rationale and must also be published. Regulations must clearly establish redress mechanisms for violations of utilities’ service levels and customer service standards. Utilities must be obliged to ensure that customers understand the mechanism for obtaining redress.

As for utilities’ corporate governance, there are three primary transparency schemes. The first is that any statutory annual and financial reports produced by utilities’ directors for their shareholders or members must be published. Second, information on utilities’ related party transactions must be published and any confidentiality policy on this issue must be standardised and justified. Finally, any plans for corporate restructuring must be, to the extent possible, published by utilities.

With regards to Passive Disclosure Rules, the thesis makes two recommendations. First, due to high cost and the unreliability of judicial

interpretation, states should not rely on Freedom of Information laws' definition of "public bodies" to ensure the applicability of FoI rules to delegated private water provisions. Privatised water utilities must be specifically designated as public bodies in the legislation. Second, the form of ownership, the level of competition, the existence of a statutory mandate to increase competition in the water sector, the relevant market for information disclosure and how such disclosure would contribute to the Public Interest are among the factors that must be considered in adjudicating whether "commercial exemption" under FoI laws applies to water services.

Finally, the thesis advocates against using access to information laws (FoI or EIR) to regulate detailed "active disclosure rules". Details of active disclosure rules should form a part of sectoral regulation, such as water laws and procurement rules. The reason is because institutions involved in the drafting of sectoral rules will have more knowledge as to which information should be disclosed in its sector. It would be incoherent if active disclosure rules for water or electricity companies, for example, are regulated in access to information laws.

Some authors have advocated that governments should enact legal frameworks for regulatory transparency at national or regional level. It is unnecessary that these are materialised in the form of specific 'regulatory transparency' legislation. On the contrary, due to its contextual nature, active disclosure rules should be embedded in sectoral laws.

8.1.3. The impact of ownership and regulatory model on transparency

Ownership and a regulatory model of water utilities has implications on how transparency can be enabled through the legal frameworks. Aquafed, The International Federation of Private Water Operators is of the opinion that Private Sector Participation "*ensures key requirements related to transparency and*

*accountability” as the contract or licence defines “the respective roles of the public authority and the operator.; the content of a regular detailed reporting, at least annual, on achievements and performance and that the private operator is permanently regulated by an authority, which checks its compliance with the contract/licence.”*¹⁶⁷⁵ Despite such a statement, Jakarta is the least transparent of all of the jurisdictions compared in almost every aspect of the analytical framework although its FoI is the most transparent. Chapter 5 demonstrated that the publicly-owned Bogor water utilities are relatively more transparent than Jakarta, in terms of general disclosure policy, service levels and customer service, tariff setting and redress mechanisms. Why is it that Bogor’s water services – in some of the aspects mentioned before – are more transparent than Jakarta, despite the fact that both are covered under similar legislations at national level?

Before we deal with the answer, we must first identify what are the causes of non transparency? The first culprit would be the confidentiality clause, which is interpreted to cover all regulatory information (including regular reporting and performance) and the contract itself which includes basic information such as service level and customer service standard contained within it. If Jakarta is run completely by a publicly-owned company like Bogor, the service levels and customer service standards would have been stipulated by law which by default is a public document.¹⁶⁷⁶ So far, the private sector’s position is that it generally does not

¹⁶⁷⁵ Payen, Moss and Waeyenberge, *Private Water Operators Contribute to making the Right to Water & Sanitation real, AquaFed’s submission, Part 3 Avoiding misconceptions on private water operators in relation to the Right to Water and Sanitation*

¹⁶⁷⁶ See section 6.4.7.4. For further discussion on this see the comparison between Bogor and Jakarta water utilities’ regulation Al’Aghani, M.M., ‘Anti Privatization Debate, Opaque Rules and Neglected ‘Privatised’ Water Services Provision: Some Lessons from Indonesia’ (STEPS II Conference, “Liquid

object to disclosure,¹⁶⁷⁷ but at the same time it remains passive instead of proactively seeking to disclose the contract. Furthermore, disclosure is not a one-sided decision as PAM Jaya's approval is required. Nevertheless, PAM Jaya (and the Governor's office) may regard the contract to be politically sensitive and therefore refrain from being transparent.¹⁶⁷⁸

Victoria has an innovative solution¹⁶⁷⁹ in manipulating the confidentiality clause in a concession contract so that it will become unenforceable in the event of an FoI request or disclosure made by regulators. Notwithstanding PAM Jaya's approval and political will from the regional government, this could be implemented in Jakarta (it would require contract amendment) and may tackle the contractual confidentiality question.

However, non transparency which is caused by the regulatory structure in Jakarta, in which there are three overlapping 'regulators', each empowered to supervise the contract (PAM Jaya, the Governor and JWSRB), may not simply be tackled by modifying the contract's confidentiality clause. PAM Jaya is the most privileged 'regulator' under the Cooperation Agreement but at the same time is also a party to the contract and evidently has a conflict of interest in the form of repayment of its debts to the concessionaires. When the institution which has a

Dynamics", organized by the International Development Study (IDS) at the University of Sussex, Sussex, 22-23 March 2011) <<http://ssrn.com/abstract=1885726>> December 15, 2011

¹⁶⁷⁷ *Correspondence with One of Jakarta's Private Sector Concessionaire Concerning Confidentiality Clause and The Publication of Contract (October 9-20)* (2011)

¹⁶⁷⁸ Aquafed's submission actually noted that local government may refrain from publishing contract or other regulatory information from fear of being politically targeted, which, if it occurs, would bring a negative impact to service delivery. Payen, Moss and Waeyenberge, *Private Water Operators Contribute to making the Right to Water & Sanitation real, AquaFed's submission, Part 3 Avoiding misconceptions on private water operators in relation to the Right to Water and Sanitation*

¹⁶⁷⁹ See Victoria Case Study sections 4.2.2.2.4 and 4.2.3

regulatory function is also the player, and has a certain conflict of interest, transparency would be very difficult to implement. A way to solve this problem is by altering the regulatory structure which reduces PAM Jaya's and the Governor's powers and transfers them to JWSRB as envisioned by Clause 51.2 of the Cooperation Agreement. However, more powers mean that it must be balanced by credible and highly qualified regulators. Thus, reforms could be conducted in phases and could start by conducting reforms on the regulator's internal governance.

Last but not least, is the position of the supposedly independent regulator, the JWSRB as the "creature of contract". As demonstrated in the Indonesian case study, the position of JWSRB as a "creature of contract" could render the application of the Freedom of Information Law problematic. It is a very odd situation, in which a regulator which is supposed to represent the Public Interest turned out not to be a "Public Body" under the FoI Law. This is contrary to the situation in the UK and Victoria where OFWAT and the ESC must comply with FoI Acts. In order to solve this, application of the Indonesian FoI Law could be extended to private entities carrying out delegated governmental functions. This sort of reform will expand the reach of the FoI not only to JWSRB but to other private entities including the concessionaires. Furthermore, inapplicability of the FoI will no longer become a problem when, in the future, the JWSRB's statute is formalised in a regional by-law.

However, reforms might be difficult for Jakarta. The Bogor municipality has been able to reform its by-law several times, the latest amendment being in 2006 but regulatory reform in Jakarta has stalled as there has been no reform since 1993. The rationale of why reforms can be carried out in Bogor is because their hands are not tied to the contract. In Jakarta, every reform project will have to be negotiated with the private sector, otherwise the government might be in breach of its contractual obligation. This also means that any regulatory reform project undertaken at national

level, such as the Water Law 7/2004 and GR-16 2005 which purports to enable accountability, transparency and participation, will have no meaning on Jakarta, because those changes will also need to be negotiated with the private sector. This is evident from the views of both the private sector and the Jakarta Water Sector Regulatory Body that ministerial and other guidelines issued by the central government are deemed not to apply to the Jakarta concession.¹⁶⁸⁰

Jakarta's water service lacks transparency in almost every dimension considered. Information is not really "available" to regulators (and hence cannot be available to the public) due to a lack of means by the regulator to acquire information (e.g. no regulatory accounting standard, no reporting duties to JWSRB). Finally, information in the possession of regulators, which is minimal due to the aforementioned reason, also cannot be disclosed to the public, because of the confidentiality provision, the conflict of interest of PAM Jaya in the regulatory structure that provides an incentive for it not to disclose information and the inapplicability of the freedom of information law to JWSRB and to the private sector. This thesis, through the case study of Indonesia, thus confirms the criticisms of several authors that regulation by contract can potentially have some transparency problems. However, the thesis suggests that this could be avoided when regulation by contract is done by previously strengthening and preparing the public law infrastructure.

¹⁶⁸⁰ See section 6.4.7

It may not be accurate to conclude that – as many authors¹⁶⁸¹ had suggested – ‘privatisation’ *per se* decreases transparency. The English case study has clearly demonstrated that the full divestiture accompanied by ‘regulation by agency’ implemented by English water utilities are fairly transparent almost in all parts of the analytical framework, the passive disclosure rule being an exception. Indeed, the major contribution of transparency in the English system is on the creation of information. From the point of view of the transparency “dimension”, the English system makes information more “available” to regulators and hence, also potentially available to the public. On the second dimension, the “public disclosure” of the aforementioned “available” information, England is also – to date – transparent. This is due to legislation which provides discretionary powers to regulators to publish information which is deemed to be in the public interest and the practices of OFWAT in publishing regulatory information such as the June Return. Unlike in Jakarta, the legal frameworks in England (legislation and licence conditions) enable transparency by providing the discretionary power to disclose, whereas, in Jakarta, the legal frameworks (the concession contract and the governor’s regulation) constrain transparency.

The drawback of the English system is probably that the information is too voluminous, thus requiring sufficient expertise and resources to interpret it.¹⁶⁸²

¹⁶⁸¹ Swyngedouw, ‘Dispossessing H 2 O: the contested terrain of water privatization’ Minow, ‘Public and private partnerships: accounting for the new religion’ Hall and Lobina, ‘Private to Public: International lessons of water remunicipalisation in Grenoble, France’ Psiru, ‘Undermining Democracy and the Environment, PSI Briefing, The Hague World Water Forum’ see Literature Review section 2.1 and Problematique at section 1.1

¹⁶⁸² Hendry, S.M., *Ownership Models for Water Services: Implications for Regulation*, vol 1 (Aileen McHarg and others eds, Oxford University Press 2010)

Therefore, there is an increase in the quantity of information, but without resourceful intermediaries, this may not necessarily translate into quality information. Fortunately, OFWAT is an able and resourceful regulator and legal frameworks contain obligations regulating the manners of disclosure including various reason-giving duties.

Ownership choice clearly has an impact on transparency in several ways. Access to information laws are directly applicable to Victorian water utilities and Jakarta's PAM Jaya which are state-owned, but not to 'privatised' English water utilities or the private concessionaires in Jakarta and Victoria. Ownership choice may also determine the outcome of adjudication in FoI cases. The Scottish FoI Commissioner opted for non-disclosure because there is a Public Interest in lowering Scottish Water's customer charges. Charging information requests would help it in doing so whereas disclosure would deprive them of such income. The situation could be different if the utility is fully divested, in which any additional levies may not necessarily correspond to lower customer charges.

Market structure will also impact on transparency. If there is a clear legislative mandate to liberalise the water sector, then it would help to define the content of the "Public Interest" towards disclosure, which would be in the form of lower charges and expansion of consumer choice through competition. As competition requires information, disclosure might be in the "Public Interest", although it could prejudice the incumbent's commercial position. There are two questions which deserve their own in-depth research: can such disclosure be regarded as a form of "regulatory taking" and what would be the appropriate methodology for the "balancing test" by public bodies?

Finally, regulatory style will also impact on transparency. If OFWAT is moving forward with the more 'light touch' risk-based regulation which removes the requirement of utilities to submit June Returns and other information, then there is a

reduction in availability of information on the part of the regulator and, as a consequence of that, a decrease in the volume of regulatory information in the public domain. Nevertheless, although the detail of information may decrease, the comprehensibility of the information disclosed may increase due to various levels of scrutiny and certification processes. This would be a trade-off between detail of information versus higher quality of information (and lower cost). There may be a hazard to this move, which would be due to the inapplicability of access to information laws on water utilities. The next section will elaborate.

8.1.4. Interaction between Passive and Active Disclosure Rules

Victoria is a good example of this synchronicity between active and passive disclosure rules, as the Freedom of Information Act is well reflected in its procurement policy and in dealing with the contractual confidentiality issue. When contracting out for water utilities, Victoria incorporates the FoI principles into the procurement guide and loss of accountability due to inapplicability of FoI (and other administrative law protection mechanism) is considered as 'risk'. This is an integrative approach which moves beyond standard value-for-money consideration in procurements. Conversely, the Indonesian procurement rules are disconnected from the FoI, presumably because it was created before the FoI law was in force. The result of this is there is no discussion at all about public accountability. Politically sensitive procurements, including water services, are confined only to standard value-for-money considerations. There are no public disclosure obligations under the procurement rule, although there are requirements in other legislations to disclose contracts entered into between public bodies and third parties. However, this is not reflected in the rules or guidelines and compliance levels have been extremely low.

Another example, where passive and active disclosure rules might be disconnected, would be England, when it decides to move to risk-based regulation. June Return data and various other regulatory information will no longer be available through OFWAT as the focus of information gathering will be based on risk. As a result, such information may not be available to the public. OFWAT has indicated that the reliance towards utilities' self-regulation will be complemented by some "active disclosure" obligation, for example, the publication of utilities' regulatory accounts and key performance indicators. But, what about the "passive disclosure" rule?

Since neither the FoI Act (to this extent, until future s.5 designation decides otherwise) nor the EIR are applicable to water utilities, then it is under no obligation to disclose anything that the public request. This is a disconnection between active and passive disclosure policies. Under the present system, if the public would like to obtain the detailed regulatory information, it can do so by submitting an FoI request to OFWAT. But, in the future, the public may no longer do so, because OFWAT no longer collect such information from utilities. Utilities may have the information, but are under no obligation to disclose because access to information laws is not applicable to them. The public would then be deprived of its ability to recover information which is available to them under the present system. Thus, despite OFWAT's efforts in requiring active disclosure of information on utilities, the public would not be able to get access in order to scrutinise the details behind those disclosures unless utilities are specifically designated as public bodies under access to information laws.

8.1.5. Recommendation for future researches

In order to increase transparency, the reform process in Jakarta such as formalisation of JWSRB statute, the transfer of regulatory authorities from PAM Jaya

to JWSRB and the expansion of Freedom of Information laws to regulated entities will require changes in both statutory laws and the Cooperation Agreement. However, as the Jakarta case study shows, there are problems for conducting reforms after a concession agreement is concluded. Most literature tends to discuss the institutional design prior to the concession. But for many of the world's water services, regulation by contract has taken place for a number of years without first adopting the necessary institutional prerequisites. Thus, the appropriate question now is how to conduct reforms whilst maintaining the ongoing contracts.

Corellated with the above question is the emerging research about the "regulatory state" in the south. The reconfiguration of the role of the state from provider to umpire accompanied by the defence of public interest in regulation and public participation in the regulatory process are all forms of an "ideal" model of the regulatory state in the northern hemisphere. Whether or not the states in the south should actually take the same path and share the same features of the regulatory state as their northern counterpart is a question in its own right.

This thesis has already demonstrated that "natural monopoly" may not by itself imply full disclosure, as in certain contexts exemptions clauses can be legitimately justified to protect the public interest, as described in *MacRoberts*. Nevertheless, in most cases, disclosure would be the norm for natural monopoly industries since there would be no need to protect competition. In this respect, there might be a question as to whether disclosure of proprietary information could be regarded as a "taking". This is not elaborated in detail in this thesis because this concerns the discussion of property right under economic regulation requiring a coherent discussion on its own. Future researches could benefit from previous works, such as Posner, which asserts that in the context of regulation, the property rights problem has to be interpreted in accordance with the regulatory aim, which is to

address the natural monopoly problem¹⁶⁸³ or Hantke-Domas, who demonstrates that denying the utility's property right if such is done under the purpose of addressing actual or future market failure, should not be regarded as taking.¹⁶⁸⁴

Finally, at the moment of writing, OFWAT's new regulatory style is still in the planning stage and few details have been produced. What is presented in this dissertation is that without adequate information input from the companies, OFWAT will have nothing to disclose. That, combined with the inapplicability of access to information laws to English water utilities, will create a transparency problem. The move towards risk regulation (and the tendency towards self-regulation of utilities), in which OFWAT will no longer implement reporting duties to companies could have more transparency implications beyond what has already been demonstrated here.

Furthermore, liberalisation of the English water industry may include overarching disaggregation, procurements and implementation of PSP models other than divestiture. When this is materialised, the question of procurement in the analytical framework will be relevant for England. The consequence of this on transparency is unknown and warrants future research.

¹⁶⁸³ Posner, R.A. and Publishers, A., *Economic analysis of law* (Little, Brown Boston 1977)

¹⁶⁸⁴ Hantke-Domas, M.P., 'Economic Regulation of Public Utilities with Natural Monopoly Features. A Study of Limitations Imposed by Property Rights from a Legal & Economic Approach' (Dissertation, University East Anglia 2005)

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10. APPENDIXES

Comparison Table

Analytical Framework			Victoria	England	Jakarta/Indonesia
Overview of the legal and institutional framework	Ownership	Treatment	Private (BoT)	Private	Private: Concession/ (Repair, Build, Operate, Transfer)
		Retail	Public		
		Bulkwater	Public with concession		Public
	Regulatory Model		Regulation by agency (except for the WTP)	Regulation by agency	Regulation by contract and agency only as facilitator (hybrid)
	Regulators	Economic	Essential Services Commission	OFWAT	Governor/PAM Jaya/JWSRB
		Environmental	Environment Protection Agency	Environment Agency	BPLHD/Ministry of Environment
		Quality	Department of Sustainability and Environment, Dept of Health	Drinking Water Inspectorate	Department of Health
		Consumer	Essential Services Commission	CC Water/OFWAT	Department of Health and the City Government

Analytical Framework		Victoria	England	Jakarta/Indonesia
Policy in involving the private sector	Allowable extent of private participation	Not clear. Water utilities must be a “public authority” but contracting out is possible.	N/A (Full Divestiture through Flotation)	Not clear. Water utilities must be owned by the state but contracting out is possible in regions ‘not yet served’.
	The decision to delegate services	Minister of the Environment		Director of PAM Jaya with Governor’s Approval. Regulation is not clear whether PSP is allowed for regions already served by publicly-owned water utilities.
	Tender	Tenders are announced on the VGPB website. Transparency is aimed both at market players/potential		Procurement Plan and Tenders are published. Transparency is aimed towards market players and potential bidders.

Analytical Framework		Victoria	England	Jakarta/Indonesia
		<p>bidders and the citizen, although the emphasis is still on market players/bidders. Contracts must contain “FoI Waiver” clause. Procurement policy integrated with Freedom of Information Law.</p>		<p>No FoI exception on the default confidentiality clause. Procurement policy not integrated with FoI Law.</p>
	Publication of Contract	<p>Yes, as a matter of policy contracts worth more than 100,000 USD in value must be given a headline and those worth 10 million USD should be published in full. Commercially sensitive information can be redacted.</p>		<p>The procurement rule does not obligate contracts to be published. The FoI Law and the Public Service Law contain obligations to publish of government contracts but these laws are not referred by the procurement rule.</p>

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Regulatory decision making	Licences	Types of licences are specified in regulation. Criteria for application and the licence conditions are regulated. Application for licences should be published in newspaper. There is a gazettal requirement to publish licences, and their amendments or modifications.	Types of licences are specified in regulation. Criteria for application and licence conditions are subject to OFWAT's policy. Licences are published by OFWAT.	Types of licences are not specified. The Jakarta's regime is not a licence-based regime. The concession contract can be regarded as a form of licence but there is disagreement regarding this as some consider the contract as a purely private arrangement. The contract contains confidentiality clauses which prevents disclosure.
	Selection and Removal of Economic Regulators	Chairperson and Members of the ESC are appointed by the Minister. The qualification for appointment is regulated under the	The Secretary of State has the power under WIA to appoint and remove OFWAT Chairman and Members for incapacity or misbehavior. England is the most transparent on public appointment, it has a centralised	Prerequisites for appointment as a member of the regulatory body are broadly regulated in a Governor's Regulation. The

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		ESC Act. Premier may suspend member or chairman accompanied by a full statement elaborating such decision to the House in Parliament. Removal must be approved by the House.	body (CPA) with a centralised website. Suspension and removal is not regulated in detail.	selection process must be announced to the public. Any suspension from office is also announced. There are no direct recourse to parliamentary scrutinies.
	Conflict of Interest in the regulatory body	The ESC Chairman should not engage in any other type of employment. There is an obligation to disclose 'pecuniary interest' (to the Minister) which then bars the ESC member from taking part in a decision. These are	The rule on CoI is vested in 'OFWAT Procedure' and not legislated. There is an obligation to disclose CoI (to the Chairman) and the member may decide to absent himself for any related decision. Alternatively, the Chairman may decide on how to proceed. The Procedure stated that when parties affected are already consulted and raise no objection, the matter will stop being regarded as a CoI. OFWAT's good practice is also	There is no detailed regulation on CoI. Measure to address revolving door is briefly addressed as a condition of appointment of economic regulator.

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		all regulated by the ESC Act.	in maintaining a register of disclosable interest which is available to the public. 'Revolving Door' is also regulated by the Procedure.	
	Means for Acquiring Information	<p><i>Legislation, Licence, Code of Practice.</i></p> <p>"Reporting Duties": Regulatory Account (enabled by the ESC Act) and ESC may issue "written notice".</p> <p>DSE (Under WIA 1994) has the power to conduct inspections but this is limited only to certain subject matters. DSE inspectors have both "search" power on utilities premises and power to require</p>	<p><i>WIA and licence condition.</i></p> <p>"Reporting Duties": WIA (wide powers, pertains to "any matter" material considered important by the Secretary of State). Licence Condition M is also wide as it requires the companies to submit information to OFWAT Chairman which is necessary for regulatory purposes. In practice, the regular information requirement is listed in the June Return reporting requirement.</p> <p>"Investigative Power": Licence Condition J regulates specifically Level of Service Information. Broad power provided to DWI inspectors, including the power to enter premises and conduct sampling.</p>	<p><i>The Concession Contract, Governor Regulation. Only the Concession Contract is regarded as the most legitimate and enforceable.</i></p> <p>"Reporting Duties": There is also an obligation of the concessionaire to 'maintain transparent account' (see Clause 50.1(a)). No specific regulatory account. It is to be noted that these obligations are owed to PAM Jaya, not the Regulatory</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
		<p>information to be submitted to it.</p> <p>“Investigative power”: Broad power given to DSE inspectors, including the power to enter premises and confiscate property. ESC has audit power under WIRO (although no power to enter premises).</p> <p>“Third party information”: The ESC (Under the ESC Act) has power to require both (i) <i>any person</i> and (ii) the <i>regulated utilities</i> to submit information to</p>	<p>“Third party information”: Duty to provide undertaking from parent companies in licence condition. There is no power to obtain information from non-regulated entity.</p>	<p>Body. There is obligation for the concessionaire to submit reports, quarterly, monthly, semi annually, including a five-yearly report to PAM Jaya (not JWSRB).</p> <p>Investigative Power: No specific power granted to drinking water quality assessor. PAM Jaya and state audit body have the right to conduct audit. JWSRB has audit rights and the concessionaire must provide <i>all requested information and data</i> for the</p>

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		them. This is a wide power and, therefore, the former can be limited through ministerial direction.		purpose of such audit. “Third party information”: According to the Concession Contract (clause 35.2.b) PAM Jaya (the State-Owned Water Company and First Party to the Contract) is entitled to obtain data and information from the concessionaires, this includes the requirement for the concessionaire to obtain information from third parties involved in the arrangement of water supply.
	General Disclosure Policy	Legislation does not contain general empowerment to	OFWAT Disclosure Policy is laid down in the Code of Practice and letters from the	Disclosure of information to third parties or the public

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		<p>disclose information which is deemed to be in the public interest. Instead, the ESC Act regulates restriction on disclosure. There is, however, obligation under WIRO to “publicly report the performance of a regulated industry”.</p> <p>If information is marked as confidential, the ESC must weigh the submission and provide the detailed rationale if they believe that it is neither commercially sensitive nor</p>	<p>Chairman and Directors concerning the publication of June Return information to the public domain. WIA contains only general provision empowering OFWAT Directors to publish materials which are considered to be in the public interest. WIA comes with a caveat that information acquired under it relating to the affairs of individuals or business should not be disclosed.</p>	<p>is not possible due to confidentiality clause in the contract. Disclosure to a third party (but not the public) is only possible through a written approval from both parties (the concessionaire and PAM Jaya). In the Governor’s Regulation on Regulatory Body, there is an obligation to maintain confidentiality as a result of the power vested in the regulatory body to obtain information.</p>

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		<p>confidential. Disclosure of confidential and commercial information may entail penalties. Information obtained from other regulators and exempted from FoI Act 1982 cannot be disclosed by the ESC.</p>		
	Investment	<p>The “Water Plan” is the primary document used for approving investment plans and set prices. The Water Plans are created by the utilities and submitted to the ESC.</p>	<p>There are several main documents important in this regard: Companies’ five year final business plans, the Security of Supply Index (SOSI) and annual leakage targets (which form a part of the Final Determination) and the June Return documents. The five year business plan is available on OFWAT’s website as well as the SOSI and the company annual</p>	<p>The contract stipulates for a five year investment programme and an annual Investment and O/M programme. The five year programme must be agreed by PAM Jaya but the yearly investment and</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
		<p>In practice, the exposure draft of the Water Plan and the final Water Plan is published (on each utility's website) as each company's SOO contains the obligation to develop an open and transparent planning process and to engage with their customers and local communities.</p> <p>The Water Plan outlines utilities' investment priorities in the next regulatory period as well as their plans for meeting those investment targets or other regulatory</p>	<p>leakage targets are a part of the Final Determination published by OFWAT. All of these documents are published as a matter of policy, but the WIA empowers this (See "General Disclosure Policy" above)</p>	<p>O/M programme requires only to be discussed with them. (see Clause 9.1 of the Cooperation Agreement). These plans are not disclosed to the public.</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
		target.		
	Service Level & Customer Service	<p>Service Level and Customer Service Standards are contained in the “Customer Service Code” (CSC), published by the Customer Services Committee.</p> <p>Every regulatory instrument except for primary legislations should be provided upon request, by the utilities.</p> <p>Water Utilities should publish a Customer Charter containing the condensed form of CSC and details of service levels and customer service</p>	<p>Service level and customer service standards are regulated in the Guaranteed Standard Scheme (GSS), Condition G of the company’s licence and a Code of Practice. As a statutory instrument, the GSS is published. Companies’ licences are also published by OFWAT as a matter of policy. The code of practice is available on the company’s website</p>	<p>There are three regimes regulating service levels and customer service. First is the Water Law 7 Year 2004 and its implementing regulation GR 16/2005, second is regional by-laws no. 11/93 and 13/92 and third is the concession contract.</p> <p>The first is quite detailed in its regulation, but its enforceability is challenged. The second hardly contains any regulation on service level and customer service,</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
		standard.		<p>except for the right to complain against a penalty decision.</p> <p>The third contains the service level provision and compensation scheme for customers, but is not published as it is considered to be a part of contractual confidentiality. According to the JWSRB, the contract contains Schedule 15 stipulating the compensation scheme for customers but this was denied by PAM Jaya.</p>
	Non-compliance	ESC adopted Key Performance Indicator.	Enforcement mechanism by OFWAT is regulated under WIA and consists of three	Neither the national rules nor the Jakarta regional by-

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		<p>Performance of each of the water utilities is published.</p> <p>There are two enforcement mechanisms: provisional and final. The purpose of such order is to ensure compliance with WIRO, Codes and Determinations or in rectifying the occurrence of contraventions. Enforcement orders must be published in the Government Gazette.</p>	<p>layers: the securing of undertakings from the companies (s.19), enforcement order (s.18) financial penalties (s 22 A). Each of these contains obligation of publication and the duty to serve notice to the company. When financial penalties are imposed, WIA and/or the Statutory Instrument requires that an OFWAT notice proposing the penalty should contain information on the amount of penalty (not more than 10% of the utility's annual turnover), the acts or omission which is deemed to constitute a contravention, supporting facts and justification and the period for the utility to make objection with respect to the penalties issued.</p>	<p>laws contain sanctioning mechanism for non-compliance with regulatory standard. The Cooperation Agreement (Clause 31) sets out a general sanctioning mechanism for the concession and specifies types of standards whose non-compliance entails penalty. This is further detailed on schedule 15. Both the main contract and its schedule are not available in the public domain. Neither the main contract nor the schedule stipulates the mechanism for</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
				<p>imposing sanction. Presumably sanctioning is imposed by PAM Jaya to the concessionaire by referring to the standards in Clause 31 and Schedule 15 and if the concessionaire disputes this, the matter will be referred to JWSRB for mediation. Thus, as opposed to England, the nature of sanctioning in Jakarta is highly negotiated. Non-compliance towards the contract standards are not officially disclosed although there are instances where they had been</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
				covered by the media. Without official announcement, this too causes speculation and confusion.
	Price Determination and Charges	One of WIRO's regulatory principles is an obligation on the utilities to enable customers and potential customers to understand price charges and how they are calculated. This is materialised by publishing the exposure draft of the Water Plan and by inviting customers and other stakeholders to submit their comments.	The company's licence condition and regulator's policies contain primary details for price determination, while legislation regulates it only broadly. All of the documents on each phase of the Price Determination are published by OFWAT, as a matter of policy. One of the primary determinants is the company's five year business plan which is available on the company's website and compiled by OFWAT (see "Investment" above). Legislation acts as an enabler to these publications (See "General Disclosure Policy" above).	Being regulated by contract, the Jakarta system does not recognise price determination. Companies are not free to impose prices within the limit set by regulator as is the case with England. Charges are contained in tariffs which must be approved by the Governor. National regulation contains transparency and

Analytical Framework		Victoria	England	Jakarta/Indonesia
		<p>Utilities conduct consultation as part of drafting the Water Plan and their methodology for consultation is then reported in the Water Plan. The time period is only one month and has been criticised as being too short.</p> <p>The ESC Act contains obligation requiring the ESC to publish a notice of Determination in the Government Gazette and daily newspaper and to enable its copies to be sent to utilities and interested parties.</p>		<p>affordability elements in tariff determination. These are not enumerated further. Furthermore, these regulations are deemed inapplicable to Jakarta concession</p>
	Redress	Customer complaints could	WIA regulates the redress mechanism for companies and	Since local regulation was

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		<p>be raised with the utilities or referred to EWOV, the industrial ombudsman.</p> <p>The Customer Charter (which must be published) contains information on dispute settlement and information on service levels and customer service standards.</p> <p>The EWOV Charter (to which utilities must subscribe) also obligates the promotion of the dispute settlement mechanism.</p> <p>EWOV maintain a list of utilities</p>	<p>consumers. If it concerns financial penalties, they can refer their objection to the High Court; for price determination to the Competition Commission (through OFWAT Director) and for a Competition Commission merger decision to the Competition Appeal Tribunal.</p> <p>For service levels and customer service, consumers can refer their case to OFWAT under its power to make “Determination”. In practice, OFWAT will issue a ‘report’ when making determination containing the factual background and chronology of the dispute, the relevant part of the GSS regulation applicable to the case, views of the disputants and OFWAT’s considerations. For non GSS disputes such as that relating to infrastructure and access, OFWAT also has power to adjudicate. Finally, CC water</p>	<p>enacted before the concession period, it contains no provision on the redress mechanism for the private sector.</p> <p>Contractually, the concessionaire may request the Regulatory Body to mediate any dispute between them and PAM Jaya. If this fails, they may, as a last resort, take recourse to international arbitration.</p> <p>Local regulation contains only a minimum amount of redress avenues. There are only three redress mechanisms</p>

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		which become its members.	has residual power to investigate when all avenues have been exhausted.	<p>available to customers under local regulation, and that is (i) the 'right' to object to incorrect water meter to PAM Jaya , (ii) the 'right' to object to imposition of penalties by the Governor and (iii) the 'right' to request an examination of water meter.</p> <p>The concession contract mandates the regulatory body to "monitor" the provision of water to customer. The contract actually contains a clause that sets out the protection of consumers' and the</p>

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				community's interest as one of the Regulatory Body's objectives but this cannot be materialised until a competent governmental authority legislates a body of rules providing special mandate to the regulatory body. Up until now, the Jakarta local parliament has not enacted anything. Hence, customers can complain about their condition to the regulatory body, but there is nothing that they can do.
Utilities' Corporate Governance	Corporate Structure and The Board	The retailers Memorandum and Articles of	The corporate structure and information pertaining to the board can be obtained through	Two different corporate regimes are applicable for

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		<p>Association as well as its amendments, (ii) financial reports, directors' reports and auditor's report and (iii) every report by the Auditor General with respect to the company must be tabled by the Treasurer to the parliaments. There is no public disclosure requirement although an annual report containing this information is in practice disclosed.</p> <p>Board Members are responsible to the Minister and in turn, the Minister</p>	<p>two general channels: (i) duty to submit register to Companies House which in turn allows the public to inspect the data stored by it for a fee and (ii) Directors' Report which is distributed to members. There are differences in the content of the Directors' Report and its method of distribution between quoted and non-quoted companies. The former has a higher threshold of reporting and requires publication on the company's website whereas the latter has a lower disclosure threshold and no requirement to publish on a website.</p>	<p>Jakarta water services: Ordinary private company law (the concessionaires) and the regional SoE Law (PAM Jaya) which is the least developed regime compared with the other regimes.</p> <p>Although there are no specific disclosure duties with respect to the identities of the PAM Jaya boards under the law, their names are available on their websites. As for the concessionaires, their data are kept by the Ministry of Law and Human</p>

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		will be held accountable for his power to appoint, remove or dismiss board members.		Rights and can be obtained for a fee.
	Related Party Transaction (RPT) and Conflict of Interest (CoI)	<p>The Corporations Act contains a duty to trade at arm's length. The Regulatory Accounting Code (RAC) does not contain such duty.</p> <p>The RAC regulates disclosure requirement for any transaction with related and third parties, requiring the retailers to disclose, among others, the identities of the parties, the services provided,</p>	<p>Under the CA, directors have a duty to avoid CoI, and if they have one to disclose it at directors' meetings. There are also provisions which may require companies to prepare group accounts and make note with respect to affiliated undertakings.</p> <p>Licence condition contains a duty to trade at arm's length and the prohibition of cross subsidy affiliates. Companies must submit regulatory accounts to OFWAT, including accounts on their transactions with affiliated companies, which forms a part of the June Return. These documents, however, are marked confidential.</p>	<p>The law on Regional SoE and the Jakarta By-law only regulates CoI briefly. It prohibits familial ties among directors and supervisory board except on the approval of the Governor. They are also prohibited from holding another office at another company. Directors (but not the supervisory board) are prohibited from having a 'personal interest' in another business whose</p>

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		<p>the payments made and its considerations. Disclosure on related party transactions, however, are only made to ESC and is deemed confidential. However, in practice the retailers disclose them.</p>		<p>purpose is to seek profit. There is no clarity on what this means. There are no disclosure rules.</p> <p>For the concessionaire, under the company law, they may not represent the company in courts if they have CoI, but such does not bar them from entering into transactions. Capital market law contains more stringent CoI and affiliated transaction rules. This also entails a disclosure duty to the public within two working days after an affiliated</p>

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				<p>transaction occurs. CoI rules requiring approval of independent shareholders, however, are not applicable to the concessionaires since they only list their bonds. All of these capital market rules will not be applicable when their bonds are matured. The concession contract contains obligation for the concessionaire to enter into “fair, transparent, competitive arm’s-length procurement” but only if the contract value is above IDR 500 million. This</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
				requirement is not detailed any further.
	Corporate Restructuring	<p>Every share issue, transfer or disposal must be approved by the Government. Any changes or amendment to companies' Articles of Association and Memorandum must be tabled at the Parliament.</p> <p>Share issue, therefore, appears to be under executive's control, although there are ex-post accountability consequences to the parliament.</p>	<p>Mergers could be referred to Competition Commission if they affect OFWAT's ability to compare. Beyond that, it has no power to block acquisition.</p> <p>OFWAT uses licence and undertaking as the legal instrument to manage restructuring.</p> <p>When restructuring results in the delisting of shares (this leads to the reduction of market information which is valuable to OFWAT), the response is to require companies to maintain the listing of a financial instrument (so that it is subject to capital market's disclosure rules) and to require the publication of its accounts as if its shares are listed.</p>	<p>PAM Jaya's restructuring is technically difficult until the Regional SoE Law is amended. Such law does not regulate the transparency of corporate restructuring.</p> <p>For the concessionaires, there are merger formalities under the company law. There are no general disclosure rules however. If companies are listed there are some disclosure obligations involving media</p>

Analytical Framework		Victoria	England	Jakarta/Indonesia
			When the restructuring causes the company to be limited only by guarantee (without share ownership, recourse entirely to debt financing) OFWAT requires it to certify that it has adequate financial and management resources and maintain “investment grade rating” in addition to the obligation to publish financial information as if its shares are listed in the stock exchange, the obligation to maintain and publish incentive schemes and to make available the copies of annual accounts and auditor’s report to customers.	announcements. This may not be applicable to the concessionaires since they are only relevant for the listing of shares, not bonds. Regulators have the power to block acquisitions and had in the past threatened to use such power to require the concessionaire to provide them with adequate information on its restructuring plans.
Passive Disclosure Rules	Applicability	All regulatory institutions and The Three Retailers are subject to FoI Act. Only Aquasure is not covered by	Regulatory institutions are subject to EIR and FoI. Private water utilities are not subject to FoI although the government is considering they be covered, probably in the next	Most regulatory institutions would be covered by FoI. The JWSRB denies that they are a Public Body as they are an entity

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			FoI.	<p>s.5. designation.</p> <p>UK's Supreme Court decision exempts private water utilities from the application of EIR but the case may be referred to the Aarhus mechanism. The reasons for non-applicability are: water utilities are <i>not deemed to exercise the function of public administration</i> (these functions resides on OFWAT and the Secretary of State) and they are <i>deemed not to be under the control of government</i> (regulation is conducted at arm's length, the means of service delivery is up to them and the government only set the outcomes and enforce the boundaries).</p>		<p>established by concession contract.</p> <p>All regional waterwork companies are listed as Public Bodies by the Information Commission.</p> <p>Private water utilities (parties to the concession contract) are generally exempted from FoI Law unless they are financed through state budget or are exercising a governmental function.</p>
	Exemption & Balancing	Regime	FoI	FoI	EIR	FoI

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	Test	Non-disclosure threshold	Medium	Low	High. Public Interest (PI) and harm test mandatory	High. PI and harm test mandatory but the notion of PI in legislation and case law is not well established.
		Types: Law Enforcement/ Investigation	Contain wide protection of all sorts of “Law Enforcement”, including investigations, adjudications, “proper administration of law”, methods of law enforcement, informants. As the term “investigation” can be broadly interpreted, it covers potential investigation by the Ombudsman towards water utilities.	May potentially block FoI request related to any enforcement action (see section on “non-compliance” above) by OFWAT.		Non-disclosure applies only if it jeopardises the life of the investigator.

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		Obligation of confidence	<p>Applicable if information is submitted to Agencies “in confidence”. Contain a Public Interest test but does not contain a harm test. The Public Interest is whether or not disclosure would impair future collection of information by the Agencies.</p> <p>This clause is not applicable to information generated jointly with the Agencies.</p>	<p>May arise from trade secret, contractual confidentiality and ‘personal’ obligation of confidence. The exemption is absolute (No PI and harm test). May virtually exempt any regulatory information but in practice OFWAT’s policy has been stringent</p>	<p>N/A as separate exception, merged with commercial information.</p>	<p>N/A</p> <p>Contractual confidentiality is a major problem, but this is considered to be a private law matter. Theoretically, contractual confidentiality should be subservient to FoI disclosure requirement. In practice, however, the threat of a lawsuit effectively deters disclosure.</p>

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		Commercial information	Protects business, commercial or financial information. Contains harm test: “expose the undertaking unreasonably to disadvantage”, “substantial harm to competitive position”.	Very broad, because unlike Victoria and Indonesia, there is no direct reference to competition.		Protects healthy competition. In the case of procurement for natural monopoly services there may be a question as to whether the exemption which seeks to protect ‘fair competition’ is relevant, because in a natural monopoly situation there are no competitors within their service area.
		Intellectual Property Rights	Absolute exemption on trade secrets information acquired from third parties.	Only trade secret is specified, other types of IPR is merged with commercial information.	Protects all IPR.	Protects all IPR.

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		Decision making and policy formulation	Protects “Internal Working Documents”. Harm test not required. Contain Public Interest Test	Protects “Policy Formulation”. Contains PI test.	Protects internal communication.	Protects internal memorandum.

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(24 September 1990)

Re Croom and Accident Compensation Commission (1989) 3 VAR 441

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